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ABSTRACT

This publication is intended to outline basic legal issues in key areas confronting the postsecondary education community, and to provide background information of which every college administrator should be aware. Chapter 1, Some General Thoughts on Postsecondary Education and the Law, discusses the increased activity of courts in campus matters and the complexity of federal law and regulations, focusing on equal employment opportunity. Chapter 2, Legal Liabilities of Administrators and Trustees, discusses criminal, civil, contract, tort and other types of liability, violation of constitutional rights, the doctrines of soverign immunity, indemnification, and insurance. Chapter 3, Legal Liability of Faculty, presents a general outline of problems, including faculty relationship with the employer-institution, defamation, confidentiality and student records, copyright and patents, research, and safeguards. Chapter 4, Developing a Faculty and Staff Personnel Policy, discusses such considerations as purpose for access to files when creating a personnel records policy, as well as the effect on access of federal, state, and campus law. Chapter 5, The First Amendment Freedoms of Speech, Press, and Association, includes discussion on the scope and application of the First Amendment within the campus environment. (KB)

LEGAL ISSUES for POSTSECONDARY EDUCATION

Briefing Papers I

Editor: Dennis H. Blumer

First of Two Sets of Papers Concerned with the Myriad of Legal Issues Facing the Postsecondary Education Community

American Association of Community and Junior Colleges

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Foreword

Accelerated change and legal issues seem to go hand in hand. Arguments as to which is cause and which is effect, or whether both are effects or some other development, are moot when confronted with a real and critical issue. Historical researchers can conduct analyses later: the practicing administrator needs to be alert, knowledgeable, and wisely responsive now. This does not imply that community college administrators must fully know and understand the law as it is applied to community colleges and to them in the practice of their work. It does assert that community college administrators must know enough to be thoughtful and wary of issues that may contain serious legal implications and liabilities. What is needed is sufficient information to tell time but not enough to construct a time piece.

With this thought in mind, the papers for this and a subsequent volume were prepared. The papers were written by lawyers for administrators and others in postsecondary education. Reviewers included college administrators, college attorneys, and business officers. Throughout the development process, authors and critics kept in mind the audience: the men and women who are responsible for administration at postsecondary institutions. The resulting papers are timely, pertinent, and as free of legalese as possible.

These papers are not intended to be definitive. They are written to provide some basic information and to sensitize the reader to what may happen when dealing with an issue. They are not a substitute for legal counsel, but they can be an early warning signal of potential legal issues.

The publishers will welcome reaction to these papers.

Richard E. Wilson
Vice President for Programs
American Association of
Community and Junior
Colleges

Preface

The purpose of this publication is to outline certain legal pitfalls which confront the postsecondary education community. A number of developments in academia have tended to increase the importance of legalisms and legal relationships in the day-to-day working environment. Among these are new affirmative action programs; new right to privacy acts; new ethical and conflicts of interest considerations; lowering of the legal age of majority; financial exigencies at many institutions; weakening of in loco parentis doctrine in the college-student relationship; increasing unionization of public employees; increasing centralization and codification of rules and regulations governing public higher education; federal and state equal pay provisions; new health and safety laws; applicability to higher education of new Internal Revenue Service interpretations; new state and federal right to privacy acts; various new judicial doctrines applicable to campuses; increasing number of lawsuits against institutions, faculty members, trustees, and administrators.

Thus college and university law is a rapidly growing field. Indeed, one of the fastest growing higher education associations is the National Association of College and University Attorneys. Yet the flowering of all of these new and complex legal issues has not fostered an abundance of readable interpretative material.

This publication is not designed in any way to replace legal counsel. Rather, we recognize the dilemma that the academic community must face these days in day-to-day decisions. This publication attempts to outline basic legal issues in key areas. The discussion in these articles contains background information of which every line administrator should be aware. We would hope that such knowledge would sharpen the reader's intuition on when to consult legal counsel, and to be aware of potential legal issues before they arise.

This publication results from a project funded by the Ford Foundation and sponsored by the American Association of Community and Junior Colleges in cooperation with the National Association of College and University Business Officers and the National Association of College and University Attorneys.

Special thanks is extended to Richard E. Wilson, vice president for programs, AACJC. Dr. Wilson was the key AACJC liaison officer for this project and helped us over the hurdles. His advice was invaluable. Special thanks is also extended to AACJC staff assistant Cheryl Cassidy, and to AACJC communications specialists, William A. Harper and Carolyn Schenkman, whose guidance on editorial, printing, and publication matters was most helpful.

Much time was devoted to the project by members of cooperating associations. Members of the advisory committee for the project, in addition to Dr. Wilson, included Peter Wolff, executive director of the National Association of College and University Attorneys, and Francis Finn, executive vice president of the National Association of College and University

Business Officers. G. Richard Biehl, director of publications at NACUBO, was also very helpful.

In reviewing the papers contained in this publication, we called upon the services of many people. Special mention should be made of: Thomas Hatfield, president, Austin Community College; David Hilquist, manager of business affairs, Oakton Community College; Dale Lake, president, Kalamazoo Valley Community College; Michael Liethen, legal assistant to the chancellor, University of Wisconsin at Madison; Steven Milam, assistant attorney general, Washington State Education Division; John Morack, vice president for business affairs, Broward Community College.

Statements made and views expressed in the articles in this volume are solely the responsibility of their authors.

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Chapter I

Some General Thoughts on Postsecondary Education and the Law

Dennis H. Blumer

Within recent memory, institutional autonomy stood as one of the most sacred concepts in academe. Indeed, it still is. But by some mysterious process institutional autonomy has quietly ebbed in the last decade, and that ebb is at least partly due to the recent activities of the courts and the federal government.

This comes as no surprise if one is familiar with the breadth and depth of the applicable federal laws and regulations, and all the major court cases which have appeared within the last ten years. These affect colleges and universities in almost all their important internal activities.

The change has been cumulative. Each individual change has been relatively small, acceptable, and almost always for an important purpose. Today all the laws now on the books are sufficient, if fully enforced, to constitute one of the largest single outside controls on institutions. Each new law is construed by its enforcing agency, none of which seems to give any special merit to the unique mission and structure of American higher education.

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[1]

The growth of the "law of higher education" manifests itself in many ways. The newsletters from the national associations are filled with notes about new statutes, new regulations, new interpretations. College counsel plays a part in most of the major policy decisions made these days; indeed, the National Association of College and University Attorneys has gone from nonexistence in 1961 to a membership of well over seven hundred institutions today. College administrators are expected to know an alphabet soup of new federal regulations and agencies: OSHA, NLRA, EEOC, DOL, OCR, and so on.

Needless to say, colleges and universities find themselves ill-equipped, especially in these times of fiscal retrenchment, to deal with the new requirements either immediately or long range. New laws, regulations, and court interpretations are having profound effects on the budgets, organi-

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zational structures, and operational policies of the institutions in ways that never would have been considered just a few years ago.

In this paper, two vital issues will be explored. First, some very brief advice concerning the increased activity of courts in campus matters will be presented. Second, the broad implications of federal statutes and regulations will be discussed. In that regard, some alternatives to the present system will be suggested.

THE COURTS

College administrators read each week of new court cases in which holdings seem to affect important segments of their work. It would be impossible in the short scope of this paper to do justice to this new phenomenon. An important task will be accomplished if the reader is warned to be cautious about hasty interpretation of any such cases. There are many pitfalls.

There is, for example, the problem of the jurisdiction of the court. While a holding of the Court of Appeals of Maryland might have some collateral interest for the administrator of an Ohio college, the administrator is best guided by what the Ohio Supreme Court has said on the subject. Indeed, different districts or circuits of the federal system may have different decisions on the same subject.

The facts of a particular case may be distinguishable from the situation in a given college, and the case therefore not applicable.

American courts almost universally require suits to be actual controversies. Moot or academic questions are not decided. So no case can be interpreted or applied independently of its particular facts.

The question of law at issue may be different. Not all tenure cases are applicable law for a tenure question in your college. The legal issue may be a contract question in one situation and a constitutional question in another.

Not the least important consideration is what the court actually held in a particular case. In the course of its opinion the court may toss off some gratuitous advice (called dicta) or may include some wholly extraneous verbiage (obiter dicta). One would be sorely misguided to rely too heavily on these.

So the best advice is simple. Do not be your own lawyer. If you hear of some new case, ask your college attorney about its holding and its applicability.

THE FEDERAL GOVERNMENT

Colleges and universities tend historically to be in the vanguard of social progress, at least in the modern era. Yet this is difficult to believe from the newspaper reports. It seems that colleges and universities are breaking the federal law every day. It makes one wonder if the present generation of college administrators is somewhat less forthright than their predecessors.

That seems doubtful. It can be argued, for example, that the range and complexity of federal laws is now such that infractions are not easy to avoid. This is compounded by the fact that many of the federal laws and

regulations are new and still somewhat vague. This of course places a heavy burden both on the regulator and the regulated. The concept of compliance or noncompliance becomes very subjective in the absence of clear rules.

This state of affairs results in some scenes reminiscent of *Catch 22*. A Labor Department official was recently quoted as saying that a major university whose affirmative action programs were under investigation was "to be deemed not out of compliance" with federal affirmative action requirements. However, one day later a different Labor Department official noted that the statement that it is not out of compliance "does not mean that (the University) is, in fact, in compliance."[2]

Thus it is often the case that colleges cannot keep track of all the applicable laws and cannot always get helpful guidance from the enforcement agencies on what the laws mean.

The most important point to be made, in the author's view, is that the present burden is just too much for most colleges and universities. They do not have the requisite batteries of attorneys and other officials. They do not have reserves of reallocable funds. Compliance for them comes slowly and adds considerable cost to their academic programs. They do not have the resources to challenge agencies whose actions are subject to question.

How many institutions have official posters displayed in conspicuous places which outline the employment rights of persons 40 to 65, as required by the Age Discrimination in Employment Act of 1967, as amended? How many institutions are posting official grade or class standings together with names of students (prohibited by the Family Education Rights and Privacy Act of 1974)? How many institutions have separate men's honorary societies (prohibited by Title IX of the Education Amendments of 1972)? How many institutions have an affirmative action program for the physically or mentally handicapped (as required by the Rehabilitation Act of 1973, as amended)?[3]

Complexity of the regulations is not the only problem. There is the real potential danger, not of harassment and injustice through misuse of the law, but rather of harassment and injustice through overlapping and inefficient laws. Most important, the energy expended by the regulators and the regulated seems to have relatively little to do with the results accomplished. Several facts should be kept in mind:

1. *Most of the laws and regulations are new.* Their interpretation is still unclear. (The situation is analogous to the passage of the National Labor Relations Act (Wagner Act) in 1935. Many sections were vague. It took many decisions of the National Labor Relations Board and the federal courts to clarify their meaning. We are at the beginning of that process with some of these new provisions.)

2. *There is a considerable amount of overlap.* Thus an institution may find itself in compliance with one agency, and not in compliance on the same or similar issue with another agency under another regulation. Although the problem may be similar, enforcement procedures differ widely.

   One particular passage from a Department of Labor document on handicapped affirmative action is quoted below. It is not atypical:

Q. Can this program be made a part of and handled interchangeably with other "Affirmative Action" programs our firm follows in hiring minorities?

A. This program is not interchangeable with other minority affirmative action programs. This is a separate program utilizing distinctive standards, and the application is entirely different.[4]

3. *The number of agencies enforcing the laws and regulations is very large.* Each has its own procedure and cooperation between agencies is not all that it could be.

There are certain generalizations which can be made about many of these federal agencies. While not true for all times and all agencies, they are of some interest:

a. *For most important purposes, federal agency employees—not elected officials—make the important rules.* They write the regulations which put flesh on the bare bones of the statue. These regulations are based on their own research. They enforce these regulations on a continuing basis, based on their own interpretations.

b. *Through the regulation and enforcement process, the enabling statute may bear little relationship to the actual regulations.* A case in point is Title IX of the Education Amendments of 1972; the title is about 40 words long. The regulations are 12,000 words long.

c. *Federal employees are answerable to the public only indirectly.* The point is obvious.

d. *Bureaucratic reference is often to private industry or the federal government.* In view of this, existing regulations tend to be written with reference to highly centralized structures—like the federal government itself. Colleges and universities are not equipped to deal with the centralized reporting and enforcement procedures. They must change their structure to respond. And thus the government forces change of the internal organization of higher education.

e. *The nature and purpose of academic institutions is sometimes misunderstood.* When administrators plead university autonomy, their motives are viewed with some suspicion. The mere scope and range of existing regulations indicates the relative merit that federal government places on the arguments of university autonomy.

f. *The actual federal official who makes the decision in a particular case is very often difficult to identify.*

g. *The issues are legal and technical and will have to be fought in legal and political forums.* In the absence of a movement to consolidate and make sense out of the morass of existing provisions it seems clear that institutions of higher education will have to object to new impractical procedures on a case-by-case basis. In a June 26, 1975 editorial, the *Washington Star* noted the following:

> "Secretary Weinberger has recently conceded that HEW's enforcement machinery needs a stripping down to the essentials, so that it may deal with 'systematic . . . discrimination' and

not merely react to the 'morning mail.' That would be a modest turn in the right direction we suppose, although Mr. Weinberger has yet to make it clear just what practical steps he might take to get the bureaucrats out of the hair of higher education."

This *Star* editorial dealt with the recent atttempt by federal officials to require certain institutions to begin a model affirmative action agreement. Most institutions felt the data required in the agreement was simply beyond their capacity to produce. The problem was finally solved, in the words of a *Washington Post* editorial (June 25, 1975):

> ". . . owing in large part to the pressures brought by spokesmen for some of the affected schools and to the good sense of Secretaries Dunlap and Weinberger."

The lesson here: we cannot expect the agencies to police themselves.[5]

h. *This is compounded by the fact that the rules change from time to time.* In part, this is in the nature of new laws and regulations. Most of the provisions of which we speak are less than 10 years old. Experience with other federal regulations, which have been in place for a longer period of time, indicate that a long trial period is required in order to establish the final working rules.

i. *A correlary of this is that enforcement offices are new, and the federal officers are new.* Common sense indicates that they will be relatively inexperienced in their jobs.

j. *It must be remembered, however, that federal agencies rarely admit error.* Thus, one will be faced with conflicting statements by different officers at different times.

To cite one example, the reader will remember the *Seattle Post-Intelligencer* article cited above, wherein to be "not out of compliance" was later interpreted to mean not necessarily "in compliance."

EQUAL EMPLOYMENT OPPORTUNITY

As an exercise it might be useful to take the hypothetical example of a president of a small midwestern community college. This president is eager to be in good faith compliance with all the laws on equal employment opportunity. We choose equal employment opportunity because it is a topical issue, although other issues could be chosen to make the same point.

Let us assume that the president reports to a school board. He has access to a school board attorney on a limited basis. He is the chief executive officer of a small community college with about 70-80 faculty members. He asks his administrative assistant to get him all the statutes, regulations, and guidelines having to do with equal employment opportunity, so that he can ascertain whether his institution needs to make further efforts in order to be in compliance with the law.

In due time, the administrative assistant returns. He reports that the Civil Rights Act of 1964, as amended, is applicable. Of special importance here is Title VII of that act, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The president

begins at the beginning and asks what is the definition of race? What is the definition of religion? What is the definition of national origin? Who enforces the law? Most important, what constitutes discrimination under the law? Those are interesting questions, replies the administrative assistant. He promises he will look into them.

Meanwhile, he mentions that there are other applicable statutes. For example, there is Section 1983 of the U.S. Code (42, U.S.C. § 1983), which prohibits discrimination on the basis of race, religion, sex, and national origin. How is this different from Title VII of the Civil Rights Act of 1964?, asks the president. Also, I have the same questions for this law.

The administrative assistant continues. As you know, there is also the Equal Pay Act. This federal law requires that equal pay be given for equal work, that there should be no discrimination on the basis of sex in pay. In what ways is that different from Title VII and from 1983?, the president asks. The administrative assistant replies that he will check into it. Also, the administrative assistant reports, you should be familiar with the Executive Order 11246 as amended, which prohibits discrimination on the basis of race, color, religion, national origin, or sex. I have the same questions for this, says the president.

Also, there is the new law prohibiting discrimination in employment for physically and mentally handicapped persons. What constitutes a physical or mental handicap? Who enforces the law? What are the penalties?

Thoroughly discouraged, the administrative assistant continues down his list. There is a new law which requires federal contractors to give affirmative action in employment to veterans of the Vietnam era, and to disabled veterans, and one which prevents discrimination in employment for certain age groups.

Let me get this straight, says the president. It is illegal to discriminate on the basis of age, race, color, religion, sex, national origin, physical or mental handicap. Well, it is more well-defined than that, says the administrative assistant. Other groups which various regulations specifically name include blacks; Spanish-surnamed; American Indians; Asian-Americans; various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups. More important, each job discrimination law I have named is slightly different from any other, and has different procedures. The president throws up his hands in despair.

Let us not belabor the issue. But be assured that the president will not be pleased with the answers to his unanswered questions, assuming that the administrative assistant is talented enough to find those answers. He will discover, for example:

The enforcement agencies of these laws are almost as numerous as the laws themselves. Title VII is administered by the Equal Employment Opportunity Commission. Furthermore, a private person has a private right of action through the courts. The Attorney General of the United States also can enforce this act. Section 1983 is enforced by the federal courts. The Equal Pay Act is administered by the Wage and Hour Division of the Department of Labor. The new handicapped law is adminis-

tered by the Fair Labor Standards Administration of the Department of Labor. The new Veterans Affirmative Action Law is enforced by the Secretary of Labor. Executive Order 11246 as amended is administered by the Office of Federal Contract Compliance in the Department of Labor. This office has delegated some of its duties to offices in the agency awarding the contract. The Age Discrimination in Employment Act of 1967 is the responsibility of the Wage and Hour Division of the Department of Labor.

Perhaps most distressing to the president as he becomes more familiar with this morass of legislation and regulations is that they overlap, and that Congress has expressly created a multitude of forms to redress the same grievance. It is conceivable that he will find investigators on his campus from several different federal agencies pursuing investigations which arise out of the identical allegations of fact.

Now, unlike the Department of Labor and its 15,000 employees, or the Department of Health, Education, and Welfare, with its 130,000 employees, the president of this community college has few resources to keep current with all the provisions of all the laws. He is at a disadvantage, even with respect to the large universities which have in-house legal counsel. Thus, as a practical matter, the administrative burden of compliance is unbearable. In many cases, unlike the large universities which can defend their interests when they are being abused, he must settle complaints. He must sign model affirmative action plans which do not fit his needs or his goals, simply because he does not have the staff to construct entirely original ones which will be acceptable to the government.

All of this would be burdensome enough for our president if the procedures were clear and the provisions distinct; however, they are not. They invite challenge, if one is to protect the rights of the institution and the personal rights of administrators and trustees involved.

It is not clear precisely who benefits from this complexity of procedures. Surely, discriminated groups do not, since the processes and procedures are no clearer to them than to college and university administrators. Moreover, the complexities contribute to the fact that the enforcement agencies are bogged down. Perhaps a complainant could gain from the forum-shopping which the laws allow. But in general, it seems clear that the cause of equal employment opportunity is not well served by present procedures.

In the late 1950's and early 1960's A. Whitney Griswold, president of Yale, inveighed against the dangers of accepting federal money. He foresaw it would not be a something-for-nothing proposition. Even today some would suggest that in order to avoid federal control of education, colleges should not accept federal money. This is not a real option. We live in an era when colleges and universities often derive 20-30 percent of their budget directly or indirectly from federal funds. So the Griswold suggestion is just not possible. In any case, many of the laws do not base their jurisdiction on the acceptance of federal money. Colleges with no federal money would still be required to follow many federal regulatory procedures.

SOME ALTERNATIVES

What is right about the present federal programs for social progress? Obviously the purpose of the programs is right. Any alternative to the present programs must ensure that it will perform no less well than existing programs.

What is wrong with the present programs? Generally speaking, 1) the specific goals are unclear; 2) the enforcement procedures are tangled and unclear; 3) colleges must finance these social programs from funds that would otherwise have been spent on their essential mission—education.

The U.S. Commission on Civil Rights Alternative

The U.S. Commission on Civil Rights recently issued a report on suggestions for improving the government's programs in equal employment opportunity. The report gives us some insight on reform as viewed by one agency of the federal government.

Among the commission's suggestions:

1. Amend Title VII to include the essence of the other laws and regulations on equal employment opportunity.
2. Abolish the other laws and the enforcement function of several agencies (e.g., Equal Pay Act, the affirmative action executive orders, the EEOC).
3. Create a new super bureaucracy, the National Employment Rights Board.
4. Fund this board to at least 150 percent of the present federal level for equal employment opportunity.
5. Restrict 50 percent or more of the resources of this board to complaints or investigations involving "patterns and practices of discrimination."

There are several problems with these general recommendations:

1. Asking Congress to Amend Title VII is a rather risky procedure. There is no guarantee that the important and positive aspects of the existing laws will be preserved in a Congressional review. Moreover, there is no indication that the result will be any less complex and tangled than the existing Congressional mandates.
2. One must tax one's memory to recall a problem which was solved by abolishing one bureaucracy and creating a larger and more powerful one in its place. Yet in the face of what seems to be clear evidence, we continue to fall back on this outworn "solution."
3. If reorganizing and enlarging the federal bureaucracy is a relatively fruitless exercise, giving it 50 percent more funding simply compounds the error.
4. The tangle of federal regulations is quite complex. Reform is needed across the board, and equal employment opportunity is just one aspect. Work in this area alone would be to attack the problem piecemeal.

What kinds of new approaches will work? While no one can speak with certainty in such matters, surely some hard thinking will produce some suggestions superior to the present state of affairs. And some obvious comments can be made at the threshold:

1. In the future, each new regulation must be considered in the context of all its effects on colleges. No new regulation should be undertaken without sufficient study to assure that the cure will be more salutary than the disease. What is wanted is some requirement of an "environmental impact statement" prior to nationwide implementation.

   A quote from the supervising staff member concerning the U.S. Commission of Civil Rights recommendations is not atypical. He stated that the purpose of some of the commission's suggested changes was so that "all employers would be treated exactly alike." That is a beguiling statement, but consider the impact. Every employer covered by the law, no matter what its purpose or present organization, "would be treated exactly alike." A superficial look at colleges alone unearths grave problems: should institutions with staff of 10 be subject to the same requirements as those with 10,000? Should predominantly black universities be subject to the same requirements? What about differences in institutions' financial resources? What about the pool of Ph.D.'s in the region (not everyone recruits nationwide)? Should state laws (which may catch some purely local inequities) be preempted totally when they conflict with the regulation? And so on.

   We lack the wisdom of the framers of the Constitution, and we should admit it. Before we make rules for all times and all places, we should do quite a bit of homework.

2. The cost of compliance with federal regulations is tremendous. Several large universities indicate that they must spend well over a million dollars annually to comply with regulations only marginally related to education, such as occupational safety and health, environmental protection, affirmative action, fair labor standards, and so on. This is money which was originally raised for education. It should be spent for education. The costs of compliance should be borne by federal funds, perhaps through some incentive system. Such a system might eliminate the need for the large, costly, and overlapping federal bureaucracy.

3. From a college's point of view, there is no substitute for institutional autonomy. Whatever the system devised, this essential concept must be preserved.

These comments must end on a sour note. If experience is any guide at all, there will be no dramatic reform of the federal regulatory function. We can predict the continuing reorganization of existing bureaucracies and the complicated amendment of complicated regulations. But one would be politically naive to assume anything more fruitful than that. Even Secretary Weinberger was apparently not powerful enough to launch reform during his term of office. It was only in the last major speech of his tenure that the Secretary noted:

". . . in the process of pouring out all of these compassionate and humanitarian blessings and institutionalizing our social obligations, we have built an edifice of law and regulation that is clumsy, inefficient, and inequitable. Worst, the unplanned, uncoordinated, and spasmodic nature of responses to these needs—some very real, some only perceived—is quite literally threatening to bring us to national involvency."

Footnotes

1. Justice Louis Brandeis, as quoted by Caspar Weinberger in a recent speech in San Francisco.
2. *Seattle Post-Intelligencer*, June 26, 1975.
3. These examples are not applicable to all institutions. But each is applicable to most.
4. "The Plain Facts About Section 503 of the Rehabilitation Act of 1973." The President's Committee on Employment of the Handicapped.
5. This despite hope generated by the following quote reported by M.M. Chambers, *Gravevine*, June 1975, and the National Association of State Universities and Land-Grant Colleges, *Circular Letter No. 12*, July 14, 1975:

   "The body of higher education is bound in a Lilliputian nightmare of forms and formulas. The constraints emanate from accrediting agencies, federal bureaucracies, and state boards. Their effects are the same: a diminishing of able leadership on the campuses, a loss of institutional autonomy, and a serious threat to diversity, creativity, and reform." A statement made by University of Alabama President F. David Mathews, before his nomination as HEW Secretary.
6. *The Washington Post*, July 16, 1975.

Chapter II

Legal Liabilities of Administrators and Trustees of Institutions of Higher Education

Bruce R. Hopkins and Thomas Arden Roha

Administrators and trustees of institutions of higher education share a common characteristic: potential personal liability in law for acts committed while acting in their official capacity. There will be some variance as to the kinds of potential liability between public and private institutions, in that constitutional protections will extend only where the government is sufficiently involved—the "state action" concept.[1] For example, nearly all community and junior colleges are public institutions. The mode of their governance varies, however, with some governed as part of a state system, some as part of a more localized system (such as a county or city), and some having an independent governing board. Some institutions' trustees are elected while others are appointed. The relationship between the administration and the trustees of these institutions will vary, as will their responsibilities.

One essential characteristic separates a trustee of an institution of higher education from an administrator: the former is a volunteer, acting out of a sense of civic responsibility, political aspirations, or a combination of these and other factors. The trustee will face a wide range of problems and challenges in that capacity, some of which will involve matters of law. Facing the myriad requirements of federal, state, and local statutes, regulations, and rules, the trustee should make a best effort to remain informed and knowledgeable but should not substitute his or her judgment concerning legal matters for that of the competent lawyer—preferably one who has some background and experience in the burgeoning field of "school law." As in so many other areas of life, success in this regard may hinge on simply knowing when to consult the lawyer.

CRIMINAL LIABILITY

A less likely type of legal liability risked by trustees and administrators in their official capacities is liability for criminal acts. The exact type of criminal liability involved would vary from state to state. Each state has its own criminal code or common law of crimes which may and often does differ from that of other states. While a thorough discussion of criminal

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liability in this context is beyond these confines, a general review of the types of activity which the criminal laws generally attempt to reach is appropriate.

A crime is generally defined to be an act coupled with a criminal intent. Thus it would be a crime to take certain money or property of a college with the intent to keep it. It is the taking coupled with the intent to keep it that the law attempts to deter and punish. The same taking without the criminal intent, such as taking certain property by accident or mistake, generally would not constitute a crime. The necessary criminal intent can generally be defined as the intent to do physical or financial injury to another in a manner reasonably certain to accomplish that result. Should the activity of a trustee or administrator come within this general definition of criminal intent coupled with the forbidden act, such activity would undoubtedly be a crime under the criminal code or common law of the particular state.

In some cases one can be considered to have had the forbidden criminal intent simply by being negligently unaware of what he is doing. If a trustee or administrator is in a position to know that others around him are committing a crime and he unwittingly renders assistance, such an individual may be considered as guilty as the principals involved. It is important in this situation that if the individual had been exercising reasonable prudence he would have known that he was assisting in the commission of a crime. In such circumstances the law may imply a criminal intent and punish the individual for his unreasonably negligent conduct.

A trustee or administrator of an institution of higher education may find himself charged with a crime with respect to a student or a colleague, such as battery or kidnapping. Or, the trustee or administrator may be accused of a crime with respect to the institution, such as embezzlement, larceny, or forgery.

CIVIL LIABILITY

Although a great deal of judicial authority does not exist to serve as background for a discussion of the potential areas of civil liability of trustees and administrators of institutions of higher education, the last several years indicate definite development of principles of law in this area. Historically an aggrieved plaintiff would bring his cause of action against the institution itself and not name its officials as defendants. It has become, however, common practice for such a plaintiff to also name all involved individuals as defendants. This practice means that trustees and administrators of colleges and universities and other nonprofit institutions will find themselves facing personal legal liability because of their positions more often in the future than in the past.

Civil liability, unlike criminal liability, has more generally applicable concepts. While many states have codified their criminal laws, often their civil laws remain reliant on uncodified common law concepts that have been in existence for centuries. It is, therefore, of greater utility to discuss the potential areas of civil liability for administrators and trustees of colleges and universities with relative certainty.

This same generality, however, makes the civil law even more flexible than the criminal. The civil law is based on one fundamental principle:

that if one through his actions in some way harms another or fails to perform a duty he was required to perform, he should be required to pay for the damage he has caused. This payment is most often in the form of money paid to the injured party rather than a fine paid to the government or time in prison paid as a debt to society. Because of this overriding principle, it is more possible for the civil law to fashion liability for the purpose of making the aggrieved plaintiff "whole" than it is for the criminal law, where the defendant's conduct, viewed as action against the state, must fall within more rigid categories.

What follows is a general discussion of the types of civil liability most frequently assessed against trustees and administrators of institutions of higher education by the courts.

CONTRACT LIABILITY

Contract liability is monetary damages assessed against a party that fails to perform a duty under a contract to compensate the other party or parties to the contract for the resulting loss. Most, if not all, contracts made on behalf of a college or university are made by the institution directly with an official signing on its behalf. To what extent, however, could the officials who executed the contract or authorized the institution to enter into the contract be held personally liable if the institution fails to perform its obligations?

The short answer to this question is that, assuming the contract was properly executed, such personal liability will rarely result. It has long been recognized that a corporate official can sign a contract for his corporation and not be personally liable. This doctrine carries over to colleges and universities, including those not incorporated but existing as identifiable public entities created by action of a state legislature or local government. The reason for this is that such entities can act only through agents, and to assess personal responsibility against their agents would act to deter individuals from taking the responsibility to act on behalf of these entities.

It is important, however, that the contract be signed by the person in his capacity as an official of the institution and not in his individual capacity. It is clear that a college official can sign a contract and be personally liable if he signs it in his individual capacity. In this way, the official would become the guarantor of the college's performance under the contract. If the college does not perform in accordance with the terms and conditions of the agreement and thus breaches the contract, the aggrieved party could seek redress against the official.

Thus, in signing a contract and presumably seeking to avoid personal liability, the college or university official should assure that the language immediately above his signature specifically states that he is signing in his capacity as an official of the institution and not in his personal capacity. Language generally considered to be acceptable for this purpose is as follows:

> IN WITNESS WHEREOF, (name of college) has, by its (president, trustee, etc.), hereunto subscribed its name and affixed its duly attested seal, at the city of _____ this _____ day of _____, 19____.

Even where the official has not signed the contract, however, there have been attempts to hold an entire board of trustees and specific administrators personally liable. One such attempt is represented by the 1935 North Dakota case of *Gottschalch v. Shepperd,* [2] where a professor who was discharged by a state college attempted to hold the college's board of administration personally liable for breach of contract. The court held as a matter of law, however, that the board was not liable even though it may have acted maliciously in prematurely terminating his employment contract.

Nonetheless, changes in the law have occurred in the years since the *Gottschalch* decision. While it may be true as a matter of law that trustees or administrators of a college or university are not liable for loss due to breach of a contract by the institution, new noncontract theories have been utilized recently to hold college officials liable for what amounts to the college's breach of contract. One example is *Zumbrun v. University of Southern California,* [3] where a 63-year-old individual was going to college to become qualified to work in the fields of gerontology and sociology. Because of her age and employment situation in the fields of her interest, she alleged that the amount of time required to obtain her degree was of the essence. One of her professors, however, as a protest against the incursion of U.S. troops into Cambodia in 1970, refused to hold further class or give a final examination. Despite the fact that she had received a grade of "B" for the course, the student sued the university, the board of trustees, and the faculty member for breach of fiduciary duties, unjust enrichment, punitive damages, and other relief. As damages, this plaintiff alleged that she was entitled to recover $518 in tuition and fees she had paid for the course, $5,000 in present loss of income, and $60,000 in potential loss of future income.

It is clear that, despite the fact that the student in *Zumbrun* labeled the theory on which she based her case something different, the basis of her cause of action was the failure of the faculty member to carry out the contractual obligation of the institution to teach the course for which the plaintiff had paid. The trial court dismissed the case outright. On appeal, however, the reviewing court noted that there existed a contractual obligation incumbent upon all of the defendants to give a stated number of lectures and final examinations. The appeals court in 1972 reversed the lower court and directed that the plaintiff be given an opportunity to prove her allegations in court.

Thus, despite the rather strong statements of the court in *Gottschalch* that trustees and administrators of colleges and universities are not liable for the institution's breach of contract, *Zumbrun* at least indicates that they may be in certain circumstances. How far the courts are prepared to go with the *Zumbrun* type of analysis is not yet clear. The emerging doctrine may be, however, that while such administrators and trustees are not personally liable where they innocently participated in the institution's breach of contract, they may find themself personally liable where they are the driving force behind preventing their institution from fulfilling its contractual obligations.

It is in this context that the 1975 case of *Endress v. Brookdale Community College* [4] may be considered. There the board of trustees of a public institution terminated the services of a nontenured member of the faculty

for writing an editorial in the student newspaper accusing the chairman of the board of a conflict of interest. The faculty member brought suit, seeking specific performance of her employment contract and damages for malicious interferences therewith. Awarding compensatory and punitive damages against the individual board members, the court stated, after noting that the faculty member "suffered the shame and mental anguish of being summarily terminated without any opportunity to give her side of the controversy," that "[p]unitive damages are absolutely necessary to impress upon the people who are in authority that an employee's constitutional rights may not be infringed."

This area of the law is in flux and any further refinements must wait for further indications from the courts.

TORT LIABILITY

A "tort" is an unprivileged interference with another in such a manner as to cause injury to the other party. Such interference may be intentional, as with assault and battery, or unintentional, as with negligence. There are many reported cases where an injured party has attempted to hold college or university officials personally liable for either the torts they committed while acting in their official capacity or the torts of other officials of the institution generally.

One such instance is the 1918 case of *Gamble v. Vanderbilt University*,[5] where the plaintiff, who was injured in the fall of an elevator in a building of the university, attempted to hold the members of the executive committee of the university personally liable for the injuries suffered. The executive committee was charged with responsibility for supervision of the building. The court held that the injuries were caused by the committee's negligent performance of its duties with respect to the upkeep of the building. It also appeared from the evidence that the committee knew that the elevator was unsafe but permitted its use despite this knowledge. On this basis the court held the members of the committee personally liable for the injuries suffered by the plaintiff.

In the 1922 decision of *Love v. Nashville Agriculture and Normal Institute*,[6] the "managers" of a college were held personally liable for the tort of nuisance in causing the college to pollute an adjoining landowner's water supply. The court specifically held that the managers could not escape personal liability on the ground that they acted solely as agents of the school. Such a defense has been successful, however, in other cases. In the 1938 case of *Scott v. Burton*,[7] the trustees of a private college were held not to be personally liable to a student for injuries sustained in the student's jumping from an allegedly negligently constructed and maintained dormitory to escape a fire. The court noted that the trustees had nothing to do with the construction of the building and there was no evidence that they knew of the claimed dangerous conditions. Similarly, in the 1894 decision of *Lundy v. Dalmas*,[8] members of an incorporated board of regents of a state university were held not to be personally liable to a person injured by a telegraph wire fallen from an allegedly negligently maintained line.

In a more recent (1959) case, *Morris v. Noustry*,[9] the dean, assistant dean, and physicians of a state university were held not to be liable in tort

to a student for ordering him off campus and giving out information about his mental condition. The court held that the actions of the university's officials were consistent with their duties of policing the grounds and protecting students from improper influences.

The issue is, therefore, not settled as to when and under what circumstances an administrator or trustee of a college or university may be held personally liable for torts committed while functioning in his official capacity. It is clear that some courts are willing to hold a college and university official personally liable for such torts. This is particularly true where the official has participated in the activity causing the injury. How far beyond this the courts will be willing to extend the personal liability doctrine is not certain. It is unlikely that any court would impose liability on a college or university administrator or trustee for torts in which he did not personally participate and which he neither had nor should have had knowledge.

VIOLATION OF CONSTITUTIONAL RIGHTS

After the Civil War, Congress passed a series of civil rights laws designed to protect the liberties guaranteed by the Bill of Rights for the newly freed slaves. Such acts were passed by the Congress in 1866, 1870, 1871, and 1875. Each of these acts retains significance today far beyond their original design. Important to administrators and trustees of colleges and universities is an enactment by Congress in 1871. The Civil Rights Act of 1871, known as the Ku Klux Klan Act, was among the last of the reconstruction legislation to be based on the "conquered province" theory which prevailed in Congress for a period following the end of the war. Although this statute established both civil and criminal liabilities, only the former remains. Found at 42 U.S.C. §1983 and 28 U.S.C. §1343(3), this act creates a cause of action and confers federal jurisdiction for civil suits to recover deprivations under color of state law, of rights secured by the Constitution and federal laws. Specifically, 42 U.S.C. §1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

23 U.S.C. §1343 grants to the federal courts, rather than the state courts, jurisdiction to hear causes of action which arise under §1983. State officers, agents, and representatives are "persons" under this provision.[10]

In the 1968 case of *Buttny v. Smiley*,[11] students who had been suspended from a college for blocking access to the placement office during recruiting sessions held by the C.I.A. sued under §1983. They alleged that the suspensions violated their First Amendment guarantee of free speech and sued the president of the university and the board of regents for redress. However, the court in dismissing their action noted that rules and regulations are necessary to maintain order and discipline on campus, and rules directed to that purpose are reasonable. The court ruled that university authorities have inherent general power to maintain order on

campus and to exclude those who are detrimental to its well-being. The court concluded that because the students were not truly exercising free speech in obstructing the entrance of a building their suspension violated neither the First Amendment nor §1983.

It is clear, however, that if a student were to be expelled from a publicly supported college or university solely for exercising his or her Constitutionally protected rights, such as free speech, the officials involved in the expulsion may be personally liable for damages under §1983. Such was the holding of the Supreme Court in 1975 in *Wood v. Strickland.*[12] In *Wood,* the Supreme Court held that the school board members are individually subject to civil rights damage actions for wrongful dismissal of public school students. Although *Wood* involved institutions of secondary education, it is clear that administrators and trustees of publicly supported colleges and universities are subject to the same potential liabilities. The court stated that a school official is liable "if he knew or should have known that the action he took within his sphere of offical responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student . . . An act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice." The case involved the dismissal, without adequate evidence, of high school students accused of spiking punch at a school party.

Thus, it has become clear that trustees and administrators of colleges and universities can suffer personal liability for action which denies a student, faculty member, or any other person the rights and liberties guaranteed by the Constitution, even where he does so under color of his official position. Among the most obvious of these possibilities is the expulsion of a student or dismissal of a faculty member for exercising his right of free speech. In a 1973 holding, for example, an appeals court in *Smith v. Losee,*[13] found that a president and two deans were personally liable in damages to a nontenured associate professor of a junior college for his wrongful dismissal in violation of his constitutional right to freedom of speech. Another realistic possibility is the allegation that representatives of the institution practice discrimination on the basis of sex in the hiring, firing, promotion, and administrative treatment of faculty and other employees.[14] Other less obvious possibilities exist, however. If an administrator deprives a student of his right of free exercise of his religion, §1983 liability could result. As respects the right of assembly, however, it is clear that no such liability could be attached to reasonable attempts by campus officals to maintain order. Liability could be sought for an administrator's violation of a student's or faculty member's Fourth Amendment right to be secure from unreasonable searches and seizures. Similarly, action by college or university officials which attempt to deprive an individual of life, liberty, or property without due process of law could be attacked under §1983.[15]

This must, therefore, be an area of special attention for officials of publicly supported colleges and universities. There is a perpetual tension between the police powers guaranteed to the states and thus to state and municipal college and university officials, and the rights and liberties guar-

anteed in the Bill of Rights. Section 1983 does not limit the ability of administrators and trustees to preserve order on campus and reasonable actions toward that end. Where, however, their actions go beyond the needs of order to actions which arbitrarily deprive individuals of protected liberties, it is possible that personal liability through §1983 may be imposed. Suits against state officials to enjoin their invasion of constitutional rights are not forbidden by the Eleventh Amendment or the common law doctrine of sovereign immunity (see below).[16]

LIABILITY FOR BREACH OF FIDUCIARY DUTY

A "fiduciary duty" can be most clearly defined as being the duty incumbent on administrators and trustees of a college or university to act in the best interest of their institution and not in their own or someone else's when a possible conflict of interest arises. The term "fiduciary duty" is a catchphrase frequently used to mean the standard of conduct imposed upon trustees and directors of nonprofit organizations. The word "fiduciary" suggests a person having duties analogous to a trustee, who generally is required to act for the benefit of another, to whom he stands in a relationship necessitating great confidence and trust and a high degree of good faith. In some jurisdictions, the precise standard of care depends upon whether the entity is a corporation or another legal form, such as a trust. A trustee is uniformly held to a high standard of care and is liable for simple negligence, while a director, to be liable often must have been grossly negligent or otherwise guilty of more than mere mistakes of judgment. (Of course, if a college or university is a corporation, the "trustees" thereof would have the duties of directors, unless a more stringent standard derives from the institution's status as charitable or educational.) The modern trend appears to apply corporate rather than trust principles in determining the liability of directors of tax-exempt, nonprofit organizations.

History records few cases assessing personal liability for breach of fiduciary duty by an official of a nonprofit institution or organization. When there is such a breach, generally any one individual suffers little and, prior to 1938, legal action was unlikely because of financial considerations. For example, assume that a trustee of a college, who is also a building contractor, causes the college to enter into a building contract at a higher price than the market rate. The trustee has breached his fiduciary duty. The increased cost in tuition and other costs to each student or others would be very small, thereby obviating the likelihood of a lawsuit. In recent times, however, legal action has become worthwhile with the advent of class action suits. Now it is possible for one plaintiff to sue for the financial damage caused the entire class of aggrieved individuals and, upon collection, each is given his proportional share of the recovery.

The possibility for bringing class action suits has been in law for many decades. Prior to 1938, these suits were rarely initiated, primarily because of the many procedural problems involved. In 1938, however, these procedural problems were largely streamlined with the adoption of the Federal Rules of Civil Procedure. These rules are not only used within the federal system, but have also been adopted by almost all of the states to govern their civil procedure. Thus, the way is now clear for classes of allegedly ag-

grieved plaintiffs to seek redress of their ostensible injury for breaches by administrators of colleges and trustees of their fiduciary duties through the class action suit.

The 1974 case of *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries et al.*, [17] indicates how successful this type of lawsuit can be. The defendant school had built the Sibley Memorial Hospital in Washington, D.C. Other defendants were past or present trustees of the hospital. The two principal contentions of the plaintiff were that the defendant trustees conspired to enrich themselves and certain financial institutions which which they were affiliated by favoring those institutions in the handling of hospital finances and that they breached their fiduciary duties in the management of the hospital funds.

The trustees of the hospital were divided into separate committees, such as the executive committee and the finance committee. Evidence presented at trial indicated that the executive committee routinely accepted the recommendations of two hospital officers, the president and the treasurer. Moreover, it was shown that the finance committee, which was established in 1960, never held a meeting until 1971. As a result, the budgetary and investment decisions made during that period were made by the two principal hospital administrators, the president and the treasurer.

Evidence also presented at trial indicated that certain of the trustees were directors, officers, partners, stockholders in, or had some other type of financial interst in certain financial institutions, such as savings and loan associations, banks, or investment houses. The plaintiffs contended, and in fact proved, that the defendants arranged to have the hospital maintain unnecessarily large amounts of money on deposit with the financial institutions in which defendants had an interest.

The court, in a particularly useful review of the law in this area, noted that a trustee or a director of a nonprofit institution is in breach of his fiduciary duty to manage the affairs of that institution if it can be shown that:

> (1) while assigned to a particular committee of the Board having general financial or investment responsibility under the bylaws of the corporation, he has failed to use due diligence in supervising the actions of those officers, employees or outside experts to whom the responsibility for making day-to-day financial or investment decisions has been delegated; or
>
> (2) he knowingly permitted the . . . [institution] to enter into a business transaction with himself or with a corporation, partnership or association in which he then had a substantial interest or held a position as trustee, director, general manager or principal officer without having previously informed the persons charged with approving that transaction of his interest or position and of any significant reasons, unknown to or not fully appreciated by such persons, why the transaction might not be in the best interests of the . . . [institution]; or
>
> (3) except as required by the preceding paragraph, he actively participated in or voted in favor of a decision by the Board or any committee or subcommittee thereof to transact business with himself or with any corporation, partnership or association in which he

then had a substantial interest or held a position as trustee, director, general manager or principal officer; or

(4) he otherwise failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care.

Applying the standards noted above, the court found from the facts presented that the defendant trustees breached their fiduciary duty to supervise the management of hospital investments. The court also set out a caveat which applies with equal force to trustees and administrators of colleges and universities. "[T]he trustee of a charitable . . . [institution] . . . should always avoid active participation in a transaction in which he or a corporation with which he is associated has a significant interest."

Liability for breach of fiduciary duty has existed in the law for hundreds of years. The *Stern* case keenly illustrates, however, how the merger of breach of fiduciary duty liability with the class action suit has caused a new potential for aggrieved plaintiffs not before possible. Although the individual plaintiff in *Stern* suffered little, by permitting him to sue for his loss and that of all others similarly situated, the law has effectively prescribed a severe deterrent to the mishandling of delegated duties by those entrusted with official responsibilities. Administrators and trustees of colleges and universities must be keenly aware of this potential and guide their actions in their official capacities accordingly. Whenever a matter comes before an administrator or trustee of a nonprofit organization or institution in which the official has a personal interest as well as an official interest, the administrator or trustee would be well advised to disqualify himself from the decision-making process. If such disqualification is impossible, the official must draw a very clear line between his official interests and his personal interest and allow only his official interests to lead him to a decision. Where possible, an official written record should be made of the basis on which the official relied in making his decision. Although such a record would by no means be conslusive, it would be valuable evidence in any lawsuit which evolved from the transaction.

Administrators and trustees of public institutions of higher education may be subject to state constitutional, statutory or common law standards of conduct, in which case such standards shall supplant those governing the conduct of their counterparts at private institutions of higher education by application and doctrine comparable to that enunciated in the *Stern* case.

LIABILITY UNDER THE INTERNAL REVENUE CODE

Generally, any liability under the Internal Revenue Code of 1954 involving a college or university is assessed against the institution itself. Because colleges and universities, other than proprietary institutions, are organizations exempt from federal income taxation under I.R.C. §501(c) (3) or as public instrumentalities, the potential for tax liability is basically confined to taxation of income derived from an unrelated trade or business (I.R.C. §§511-514). There exists, however, a potential liability for trustees and administrators which oftentimes goes unnoticed, until assessed.

Section 3402 of the Internal Revenue Code requires that employers withhold income tax from the wages of employees. (Exempt colleges and

universities are not liable for social security (FICA) taxes unless the exemption is expressly waived as provided in the Federal Insurance Contributions Act.) The withheld funds are forwarded to the government and credited to the employee's income tax liability for the year. This is the federal government's chief mechanism for the timely collection of revenues, and severe penalties may be assessed against those abusing the system.

An official who willfully fails to collect this withholding from employees is assessed under I.R.C. §§6672 a penalty for such failure in the mandatory amount of one hundred percent of the entire amount willfully not withheld. For officials of colleges or universities with a high number of employees, the potential for this liability can be significant. Moreover, the Internal Revenue Service has not been reluctant to assess this penalty. It is the position of the Service and the government generally that the withholding system for collecting revenues is so vital to the financing of government operations that examples may rightly be made of violators in order to deter other potential offenders.

Administrators and trustees of colleges and universities, therefore, who are involved in the paying of wages to employees and the payment of withheld taxes to the government, should assure that they carefully remain within the confines of the law in this area. Caution should not only be used in the collection and payment of withheld taxes to the government but in determining which of those who work for the college or university are "employees." No such requirement exists for "independent contractors" working for the institution. The traditional line drawn between the two terms is that, while an employer may control an "independent contractor" only in the results he achieves, he may control an "employee" as to both the results and the means utilized in reaching them. Other considerations are important also, such as whether the individual works only for the particular employer or for many, the amount of time which the individual works for the particular employer, the type of work he does, and the general reasonableness of labeling a certain individual one or the other. It is clear, however, that a college official who willfully labels a worker an "independent contractor" for the purpose of eluding the withholding requirements may be liable for the 100 percent penalty under I.R.C. §6672.

Particularly difficult problems arise in this context in connection with the availability of the exclusion of I.R.C. §117, relating to scholarships and fellowship grants. Many colleges and universities provide support to students, particularly degree candidates, which should be excludable from their gross income (and thus withholding is not required) where the teaching, research, or other services are required of all candidates as a condition to receiving the degree. However, the 1969 Supreme Court case of *Bingler v. Johnson*[18] has raised myriad questions about the scope of the exclusion, as the case suggests that where an element of service exists the payment in connection therewith cannot be a scholarship or fellowship. Thus, in the instances of payments such as degree candidate stipends and tuition remission to faculty, college and university administrators must make a decision as to whether withholding is required.[19] Developments in this area are far from resolved, as attested to by the attempts of the I.R.S. to tax the dollar value of student loan cancellations.[20]

DOCTRINE OF SOVEREIGN IMMUNITY

Since early common law, and possibly since Roman law, it has been a basic principle that one who has suffered a loss due to governmental action could not recover for that loss in court. Known as the doctrine of "sovereign immunity," this legal theory finds its genesis in the concept of the divine right of kings—that "the King can do no wrong"—along with the general belief that it was a violation of his sovereignty to allow a king to be sued in his own courts. Although the United States has forsaken rule by kings and queens, it has never felt itself obliged to break away from this anachronistic legal concept. Without providing the benefit of his reasoning, Chief Justice Marshall in 1821, in *Cohens v. Virginia,*[21] declared that no suit could be commenced or prosecuted against the United States. Despite the fact that virtually no legal scholar since then has had much good to say for it, the doctrine of sovereign immunity has remained the established law of the United States (with statutory exceptions), effective not only for the federal government but for states and municipalities as well.

To what degree will this doctrine, which shields various governmental units from liability, act also to shield governmental agents such as officials of a public institution of higher education? The number of cases involving administrators and trustees of public colleges and universities where plaintiffs have been successful lead one to conclude that the doctrine cannot be relied upon with any degree of confidence. There is a growing tendency for the courts to skirt the doctrine by permitting relief nominally against government officials in their individual capacity. The theory relied upon here is that a government official is acting outside the scope of his authority and discretion when he commits wrongful acts. The common law may provide immunity from damages for trustees and administrators of state institutions who acted wrongfully or even unconstitutionally where they did so in unquestioned good faith and in perfect accord with long standing legal principle.[22]

As the doctrine has been refined in scope, it now appears to be the rule that government officials are liable for the mishandling of their ministerial duties but not for their discretionary ones, unless they are found to have exceeded the bounds of their discretion. "Ministerial duties" are generally defined as those which must be done as a matter of course by virtue of occupying the office alone. Where, however, there exists discretion as to whether a certain act should be performed, or the reasonable method for doing so, no civil liability may be assessed, absent an abuse of discretion.

Much of governmental sovereign immunity is now governed by statutes of the various states. Often the standards and applications of the doctrine of sovereign immunity vary greatly from jurisdiction to jurisdiction. For example, in California, government officials can be held liable for torts committed within the scope of their official duties whether those duties be ministerial or discretionary. Kansas and Georgia law state that the doctrine does not apply for officials of lower rank where the officer does not act honestly and in good faith, but instead acts maliciously or for an improper purpose. Other states, such as Vermont and Minnesota, refuse to follow this particular diversion from the general rule. These examples indicate the variance existing between the laws of different jurisdictions and the inadequacy of any attempt to speculate on the degree to which the doctrine of sovereign immunity will protect a college or

university official. The doctrine has been much criticized and courts are becoming more reluctant to rely on it as the basis for decisions. Although it may protect a college or university official in certain situations in certain jurisdictions, it surely should not be relied upon in lowering the standard of care with which an administrator or trustee of an institution of higher education views his official duties.

INDEMNIFICATION

The directors and officers of profit-making corporations generally are indemnified by the corporation for any loss they may incur by reason of their service to their corporation. This device is also employed in certain circumstances for trustees and administrators of nonprofit institutions, including colleges and universities. In fact, there is probably greater justification for indemnification of such trustees who frequently devote their time and energies to the institution without compensation.

The extent to which trustees and administrators may be indemnified by their college or university depends on the charter and bylaws of the particular institution, or the existence of a separate agreement between the official and the institution, and the laws of the relevant jurisdiction. The laws of the various states vary greatly on this point. Some preclude indemnification altogether, others will permit it if authorized by the articles or bylaws of the institution, and still others will permit it only for certain specified losses. Generally, indemnification is permitted at least in part for certain types of liability a college or university administrator or trustee may suffer. This is, however, a matter to be governed by the organizational documents of the various institutions and the laws of the various states. If and when a question arises, these documents should be consulted. If indemnification is considered desirable, the organic documents of the college or university should be reviewed to assure that they permit indemnification to the maximum extent permitted by state law.

INSURANCE

Because indemnification is generally permitted only under limited circumstances, it is often desirable for a college or university to purchase insurance for its administrators or trustees to protect them against loss suffered by reason of their official position. Generally, unless the doctrine of sovereign immunity is seen as affording adequate protection, every institution will provide insurance for itself to cover liability within certain limits. Oftentimes this liability policy will itself cover losses suffered by administrators and trustees.

As with indemnification, insurance can generally be purchased to protect a college or university official only from certain types of liability. It is feared that, by assuring a college or university official that he will never be forced to bear personal liability for any activity related to the institution, the official may lessen the standard of care with which he approaches his responsibilities. This would violate public policy and thus be illegal. Certainly no insurance could be purchased to cover instances of concerted dishonesty.

This is, however, an area, like others previously discussed, where the laws of the various states must be consulted before a definitive answer can

be given. Oftentimes the state superintendent of insurance will have regulations available which can serve to advise officials of colleges and universities as to when and under what circumstances insurance will be permitted. As with the previous section, if insurance is considered desirable, the position of the particular institution should be reviewed to assure that it conforms with the maximum coverage permitted by law.

CONCLUSION

Many of the legal problems faced by administrators and trustees of colleges and universities as such can be avoided through the timely resort to legal counsel for advice. Frequently, however, a legal problem is not recognized by a nonlawyer until (if at all) well after the act or omission which gives rise to potential legal liability has already been completed. Some general guidance may be useful, therefore, as to when legal advice should be sought.

It has become indispensable for a college or university to retain or employ legal counsel who has knowledge of the institution, its organizational structure, its policies, and its goals. This familiarity with the institution will often permit the lawyer to spot potential areas of legal liability early and allow him or her to professionally guide all of the parties involved through the complexities of the law. This familiarity with the particular institution can also foster an easy working relationship between the lawyer and the officials of the college or university which will allow for a frank and productive exchange of information. By retaining legal counsel who is familiar with the body of law that is becoming known as "school law" or even "college and university law," the institution can assure that its lawyer has the greatest knowledge of the precedents and experience in legal matters of most importance to the institution.

Even the most competent legal counsel, however, cannot render assistance in areas of potential legal consequence without first having the potential problem brought to his or her attention. Generally speaking, a lawyer should be consulted whenever action by a college or university official will affect either the institution's legal rights or those of some other party. Thus, a lawyer should review every contract that the institution intends to enter into before any agreement as to its terms. A lawyer should review the institution's policies for expelling and disciplining students and for hiring, promotion, and firing of faculty and other employees. As noted in prior sections of this paper, an error by the institution may subject the implementing official to personal liability. Tax, securities, real estate, and comparable questions should, of course, be handled by trained legal counsel.

However, the foregoing rule is admittedly conclusionary in nature, for the entire problem may be lack of realization that any "legal rights" are involved in the particular action. That is why, once an institution retains or employs legal counsel on a regular basis, it is essential for administrators and trustees, either individually or as a group, to periodically consult with legal counsel and solicit a review of the activities of that particular college or university that could give rise to legal liability. This paper offers a general guide to the types of legal liability that could arise for administrators and trustees. Each institution may. however, have

special and unique operations and policies which may not fit within such a general outline and for which the administrators and trustees may need special guidance.[23]

A concluding note of caution: The lawyer employed or retained on behalf of a college or university represents the institution and not individual representatives or agents of the institution. Of course, in many instances, representation of the institution will mean representation of its governing board and administration when these individuals are acting in their official capacity. (Such representation is less likely to include the institution's or the faculty's or student's.) However, where discretion and authority are exceeded, the interests of an administrator or trustee and the institution may diverge or conflict, requiring the entry of separate counsel for the former.

Footnotes

1. E.g., *Spark v. The Catholic University of America,* 510 F.2d 1277 (D.C. Cir. 1975); *Powe v. Miles,* 407 F.2d 73 (2nd Cir. 1968).
2. 65 N.D. 544, 260 N.W. 573 (1935).
3. 25 Cal. App. 3d, 101 Cal. Rptr. 499 (1972).
4. No. C-1808-74, Sup. Ct. N.J., Chancery Div. (April 30, 1975).
5. 138 Tenn. 616, 200 S.W. 510 (1918).
6. 146 Tenn. 550, 243 S.W. 304 (1922).
7. 137 Tenn. 147, 114 S.W. 2d 956 (1938).
8. 104 Cal. 655, 38 P. 445 (1894).
9. 323 S.W.2d 301 (1959), *cert. den.* 361 U.S. 889, *reh. den.* 361 U.S. 921 (1959).
10. See *Monroe v. Pape,* 365 U.S. 167 (1961).
11. 281 F. Supp. 280 (D. Col. 1968).
12. 420 U.S._____, 95 S. Ct. 992 (1975).
13. 485 F.2d 334 (10th Cir. 1973). Cf. *Roseman v. Hassler,* 382 F. Supp. 1328 (W.D. Pa. 1974).
14. See *Taliaferro v. State Council of Higher Education,* 372 F. Supp. 1378 (E.D. Va., 1974).
15. See, e.g., *Adamian v. University of Nevada,* 359 F. Supp. 825 (D. Nev. 1973). Cf. *Lai v. Board of Trustees of East Carolina University,* 330 F. Supp. 904 (E.D.N. Car. 1971).
16. *Georgia R. Co. v. Redwine,* 342 U.S. 299 (1952); *Ex parte Young,* 209 U.S. 123 (1908).
17. 381 F. Supp. 1003 (D.D.C. 1974).
18. 394 U.S. 741 (1969).
19. See Rev. Rul. 63-250, 1963-2 C.B. 79. Cf., eg., *Logan v. U.S.,* ____F.2d____(6th Cir. 1975).

20. See Rev. Rule. 73-256, 1973-1 C.B. 56, as modified by Rev. Rul. 74-540, 1974-44 I.R.B. 6.

21. 5 U.S. 82 (6 Wheat) (1821).

22. See *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184, 189 (E.D. Va. 1970).

23. See, in general, Sensenbrenner, "University Counselor: Lore, Logic and Logistics," 2 *Journal of College and University Law* (No. 1) 13 (1974).

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Chapter III

Legal Liability of Faculty

George M. Shur and Richard P. LeBlanc

Generally speaking, a college faculty member is subject to the same laws and standards of conduct as any other citizen. However, standards of conduct vary depending upon the situation and the station of the individual. The sphere of higher education seems to present some unique problems with respect to both the "reasonableness" of certain conduct and the potential legal liability that might arise from such conduct. A brief monograph such as this obviously cannot cover all areas of potential liability of college faculty. The purpose of this paper will be to highlight some of those areas of legal liability which we believe ought to be of concern to administrators and faculty members.

We begin with a very important caveat. Because of the complexity of the American judicial system, with its 10 federal jurisdictions and its 50 separate state court systems, what might be the law in one jurisdiction is not necessarily the law in another. Thus, every legal decision must be read with the understanding that the result might well have hinged upon unique or special local practices or statutes which have absolutely no applicability to the jurisdiction in which the reader resides.

Accordingly, this paper can only present a general outline of problems and cannot be relied upon as the final word on any situation that might arise in a particular context or jurisdiction. The purpose of this paper is to increase awareness of certain problems and *not* to provide ready answers. Once there is the realization that a problem exists, local college or university counsel should be consulted so that the problem can be reviewed in light of the most recent court decisions and the appropriate law of the jurisdiction within which the problem arises.

An attorney conversant with legal problems affecting higher education, or any attorney for that matter, is trained to practice "preventive" law. That is to say, the capable and concerned counsel tries to keep his client *out* of court, but when litigation is either inevitable or thrust upon him, will vigorously defend his client. Please don't consider lawyers as tools to be used only where litigation is threatened or has been brought. No attorney, no matter how skilled, can erase the errors of his client institution or its employees. A bit of legal advice at the early stages of a simmering controversy can often lead to either a settlement of that controversy or a stronger case in court.

A further caveat is also in order. Unfortunately we find ourselves in a maelstrom of litigation involving higher education. What is good law today might not be good law tomorrow. An example of this is the unfor-

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tunate experience of the school board of the town of Chagrin Falls, Ohio, which, pursuant to a federal district court decision involving a neighboring city, promulgated certain rules in good faith relating to compulsory pregnancy leaves.[1] Imagine the board's surprise when the decision of the district judge was overturned by the Sixth Circuit Court of Appeals,[2] and discovered that, despite the district court's decision, the board had become defendants in a lawsuit.

One certainly cannot criticize the people of Chagrin Falls for acting as they did. They relied upon what was to their knowledge the most recent state of the law. Unfortunately, the law changed, and before the school board could react and change its policies, it was confronted with a lawsuit. It is significant, however, that since the board members were acting in good faith, they were not personally assessed with damages. Although an educator (or his counsel) cannot always predict what the law will require in a given situation, a good faith attempt to act reasonably under all circumstances will generally shield the individual educator from personal liability because of such conduct.

FACULTY RELATIONSHIPS WITH EMPLOYER-INSTITUTION

The logical starting point when legal problems arise at an institution of higher education is in the office of that institution's legal counsel. This is true if for no other reason than that, depending on the potential problem, the liability of the faculty member might well be the liability of the institution. So the first question which must be answered is whether the professor is, in fact, an employee of the institution or whether he or she is an "independent contractor." Typically,

> *the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.*[3]

It is clear that traditionally a college or university does have the right to hire and fire, the right to control courses offered and, subject to the strictures of academic freedom, the right to specify course content and procedures. Accordingly, a faculty member is likely to be considered an employee of the institution rather than an independent contractor.

If the professor is considered an employee, the old legal doctrine of "respondeat superior" would generally lead to the legal finding that the sins of the employee are imputed to be those of the employer. Therefore, it is likely that the employee-professor would have the benefit of college counsel in defending any action brought against him or her on the college requesting either money damages and/or injunctive relief. The only limitation to this "protection" is where the conduct of the faculty member is quite clearly above and beyond the scope of the authority for the normal professorial duties of that individual. For instance, it is inconceivable that the institution could be held responsible for an automobile accident which was due to the negligence of the employee unless, of course, that faculty member was driving a university vehicle or was in the course of conducting business on behalf of the institution. To use a contrary example, a department chairperson, exercising discretion in a reappointment determination could well subject not only himself but the institution to a claim for damages for violation of a faculty member's procedural or substantive civil rights.

Of course, this protection of the individual faculty member is further tempered by the right of the institution to proceed against the individual faculty member for damages which may be assessed against the institution (although this would admittedly be a rare occurrence, justifiable only under extreme circumstances). If a faculty member is not properly classified as an employee of the institution, then the relationship would have to be that of an "independent contractor." This classification is clearly disadvantageous to the faculty member, as it means that he or she would not be afforded the protection of "respondeat superior" and would run the risk of a greater personal exposure to law suits and attachment of personal or real property to satisfy judgments. Also, the independent contractor-professor would be precluded from being included in an employee group for purposes of collective bargaining or receiving employee "fringes"—group pension, medical, unemployment, or disability benefits.

The faculty member's actions *must* be judged in essentially the same manner as any individual is judged. Yet, actions within a college structure must be judged within that context. What would a "reasonable" person do under the circumstances and within the academic environment? Might there be a somewhat different standard of reasonableness for the professor's activities in the "outside world?"

There follows a series of potential problem areas for faculty members. The list is not exhaustive—it merely attempts to highlight some typical legal pitfalls which might uniquely affect the individual teaching at an institution of higher education.

DEFAMATION

College or university professors, like everyone else, are subject to the laws of defamation—laws which vary from one jurisdiction to another and which are aimed at protecting the privacy and good reputation of the individual from unfair and false attacks. On the other hand, all citizens (including faculty members) are entitled to express their opinions and views forcefully in a "free marketplace of ideas" under the constitutional guar-

antees of free speech and free press. The obvious tension between these two competing public policies has resulted in the development of a hodgepodge of contradictory rules, exceptions, privileges, and defenses that make up our current law of defamation.

As a result, there is no simple answer to the very basic question "what is a defamatory statement?" which applies with equal force to all jurisdictions. Many states even make rather meaningless distinctions between libel (written defamation) and slander (oral defamation) in this regard. Generally speaking, however, defamation is that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, good will, or confidence in which a person is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against that person.[4]

If such a statement is made (or published) to one or more third parties *and is untrue,* then the victim of such defamation is probably entitled to recover damages for this invasion of his rights. We say "probably" because in some instances a plaintiff must prove actual damages before he can recover any, whereas in other instances such proof is not required in order for damages to be awarded. In addition, a number of "privileges," either absolute or qualified, have arisen in this area of the law which can shield a person from personal liability even though a defamatory statement has, in fact, been made. Perhaps the most relevant development in this regard from the point of view of a college professor is the new *constitutional privilege* in the area of defamation mandated by the famous case of *New York Times Co. v. Sullivan* in 1964.[5]

In that case, the United States Supreme Court ruled that the First Amendment confers a qualified privilege upon a defendant in a defamation action brought by a public official to not only express his comments and opinions about that public official, but also to make *false statements of fact*, provided they are not made with knowledge that they are false or in reckless disregard of the truth. In other words, so long as the defendant is acting in good faith, he need not be absolutely certain of the truth of every fact he asserts in order to avoid a defamation suit. In fact, even if he negligently publishes a defamation without verification, the victim of the defamation (if a public official) cannot recover. The law now provides that a plaintiff must actually *prove* either knowledge of falsity or reckless disregard of the truth in order to defeat the qualified privilege provided by the *New York Times* case.

This landmark decision has been followed and expanded by a number of subsequent decisions and has been held to apply not only to "public officials" but to all public employees, no matter how inferior or lowly their station.[6]

It has also been extended to other "public figures" and even to persons who just happen to be in the news,[7] so that today virtually anyone who is in any way "in the public eye" would come within the strictures of the *New York Times* rule. This, of course, does not mean that one can now indiscriminately attack any person who might be considered a "public official" or "public figure" without being in any way concerned about the truth of the statements being made. The test is one of good faith and, to a lesser extent, one of reasonableness. Fabrications of falsehoods or the repeating of defamatory rumors in reckless disregard of the truth can (and probably will) result in legal liability. The purpose of the *New York Times*

rule is to encourage robust debate and the uninhibited interchange of ideas on the theory that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[8]

It should also be pointed out that it is the area of defamation which traditionally provides the professor with the least amount of protection from the institution. Most defamatory statements or remarks are clearly the sole responsibility of those making them. But one would have to caution the institution that the publication of defamatory statements either by a college newspaper or journal or by the institution adopting either explicitly or implicitly this statement, could submit the institution itself to liability. Whereas it is to be hoped that most professors would not presume to speak on behalf of the institution (without specific authority to do so), we all know that sometimes this occurs. In the event that the employee defames someone during these "official " pronouncements, the institution would undoubtedly be named as a party to the lawsuit, but would nonetheless argue that any damages assessed against it were the responsibility of the individual employee who was quite clearly acting outside the scope of his or her authority.

CONFIDENTIALITY AND STUDENT RECORDS

Just about every faculty member has at one time or another been asked to write "confidential" recommendations for students who are applying for jobs or graduate school. Be aware that confidentiality is dead for all practical purposes. I would refer you to the so-called "Buckley Amendment" or the "Family Educational Rights and Privacy Act of 1974."[9] Rather than go into detail, suffice it to say that the Buckley Amendment has made school records available for inspection to students. Fortunately, an amendment to the act, effective January 3, 1975, has "grandfathered" the confidentiality of documents which may have been within the university's possession prior to January 1, 1975; has allowed the student to sign an informed waiver for purposes of applying for admission to postsecondary or graduate schools; and further exempts those records which are in the sole possession of the maker thereof and do not become part of the student's university file.

One must assume that most institutions of higher education have by now adopted procedures by and through which the student may obtain access to his or her file. It would be a naive professor who would seek to circumvent these procedures and attempt to alter, destroy, or remove papers from a student file. Even though the Buckley Amendment does not specifically create a private cause of action or law suit, the professor or administrator might well subject himself to personal liability for the improper alteration, removal, or destruction of student records. Before there is any attempt to alter in any way the contents of a student file, the college counsel should and must be contacted, and a ruling should be sought on the legality of the proposed action. Finally, as we all know, the enforcement tool of the Buckley Amendment is the withdrawal of funds administered by the United States Commissioner of Education. While it is to be hoped that adequate opportunity for explanation will be afforded by the Department of Health, Education, and Welfare, the result of a faculty member's viola-

tion of the Buckley Amendment could be the cancellation of a program or programs with which that faculty member is intimately involved. So. for the sake of the institution and the faculty member (who may be subject to personal liability), the college employee should handle student records with the greatest of care.

We have heard of certain instances where faculty members have declined to write recommendations unless and until the requesting student supplied them not only with a waiver but also with a release and covenant not to sue. While it is unlikely that the courts would uphold such a prospective release or covenant, it seems to us that this is essentially unsound academic practice. True, no one can *force* a faculty member to write a recommendation in the first place. Some teachers politely decline to supply references for those students whom they feel they cannot fairly evaluate or for whom they would have little good to say. But supplying references is an integral part of the employment responsibilities of a teacher and adviser, and this responsibility should not be abrogated by fear of potential personal liability.

So long as a faculty member acts in good faith and without recklessness or malice, he or she is protected to a great degree from any student who wishes to challenge in court the contents of a recommendation or reference.

As institutions of higher education expand, contract, and merge, the professor is confronted with a maze of rules, regulations, and policies, some of which are legally inspired (by state or federal law or regulation) and some of which are rooted in academic policy. The professor would do well to familarize himself with the rules, regulations, and procedures affecting the faculty member's position within the institution, if for no other reason than that a willful or reckless violation of same might result in the withdrawal of the institution's legal protection and the claim that the faculty member was acting alone and outside the scope of his or her authority.

CRIMINAL ACTIVITIES

Neither is the university or college professor immune from criminal prosecution under state or federal statutes. What might be considered apropos or acceptable in the context of a campus might, upon close examination, be in direct violation of the law in a particular state or district. Not incidentally, a violation of a criminal statute may be considered compelling evidence of negligence in certain circumstances and the conviction of a crime could affect civil liability. Without attempting to enumerate all those circumstances (which change depending on applicable statutes in the various states), it should be sufficient to note that even though many institutions have reached an accommodation with the local gendarmes, the police do have the right to enter a college campus to enforce the criminal laws.

An English professor might be particularly dedicated to "blue poetry." A classroom recitation could well violate the antidiluvian laws prohibiting public blasphemy or obscenity and, in the case of the 17-year-old freshman, might it not be logical for the prosecutor to argue that a faculty member was contributing to the delinquency of a minor?

Even though the age of majority in most states is 18 years, most college campuses have at least a few students who are properly qualified as minors. It is no more legal for a faculty member to furnish prescribed drugs to anyone or alcoholic beverages to a minor than it would be for any other citizen. And, some states still prohibit sexual relations of adults with minors.

Picture, if you will, the faculty member who, in the guise of rehabilitating an errant student, corners that student in an office or classroom and seeks, forcibly or otherwise, to instill the job of learning and discovery. Would that teacher not be guilty of assault and/or battery should the student be physically touched or placed in fear? And false imprisonment? And shouldn't a faculty member certifying a grant request be held to the same criminal standards of fraud and misrepresentation as though he or she were making out a personal tax return?

DON'T TRY TO OVER-ACHIEVE

Professors cannot be all things to all people—they are trained specialists, but specialists only in a specific area. Most states have laws prohibiting the illegal practice of law, medicine, psychiatry, or other professions without a license. When does scholastic counseling become psychiatric counseling? If in doubt, refer the student to the appropriate college authorities.

People trained to handle emotional or social problems should, in turn, be aware of a recent decision by a California trial court. The case is unreported, but we have learned that even though a state law might guarantee that communications between a counselor, psychologist, or psychiatrist and patient are privileged and cannot be communicated to anyone without the consent of the patient, there are certain instances where the counselor might have an *obligation* to report aberrant behavior to appropriate authorities. In California, a university counselor learned of a student's desire to kill his exgirlfriend. Since the student, during the counseling session, was acting in an irrational manner, campus security was called and was asked to detain the student. At no time did the counselor disclose the threat to anyone. Two or three months later, the student killed his exgirlfriend with a knife. The girl's estate filed a lawsuit against both the counselor and the institution, and the jury found for the plaintiff and assessed damages against both the university and the counselor.

This imposition of a duty to inform law enforcement authorities and/or potential victims of acts of violence could have far reaching implications for certain college personnel. This is not a "reported" case, i.e. the decision has not been published and hence would have little, if any, precedential value, but it does show the thinking of at least one trial court in one jurisdiction in this country. A school counselor must grapple with his or her own concept of professional responsibility and accountability in cases of this nature. Legal counsel can and should be sought without the necessity of making full disclosure of the names of the individuals involved. Certain states have protected by statute the privilege between counselor and patient, while others have not or have limited this privilege to a certain class or type of counselor. Applicable local laws and practices should be checked.

While no one could fault a parent for failing to refer a child to psychiatric care, the teacher must realize that he or she is not the student's

parent. It is always better to err on the side of caution than to foster a situation which can lead to horrible consequences for the student. It could also lead to a criminal charge against the faculty member for the unauthorized practice of medicine or psychiatry and the probable imposition of civil liability should the student's health and welfare be affected by the failure to take reasonable action.

COPYRIGHTS AND PATENTS

Librarians are undoubtedly familiar with the recent case of *Williams & Wilkins Company v. the United States.*[10] Obviously, anyone who reads an article or book has the right to briefly quote from it and perhaps even make copies for personal use. This "fair use doctrine" is not absolute. For instance, the issues in the *Williams & Wilkins* case revolved around the right of the U.S. Department of Health, Education, and Welfare to photocopy an article from a medical journal and distribute it to numerous staff members. The plaintiff tried to show that the Department violated the "fair use doctrine" and demanded money damages. The issue was met, somewhat indirectly, by the U.S. Supreme Court which recently affirmed the lower court's decision that the H.E.W. activities were not violative of the "fair use doctrine." However, this decision must be tempered by the fact that the Supreme Court was evenly split on the merits of the case, automatically resulting in the affirmation of the lower court's decision in favor of the government. Since the Supreme Court is decidedly split on this issue and since every case has its own unique set of facts, faculty members should still be wary of wholesale distribution of photocopied material.

CBS News with Walter Cronkite has recently added a statement in its credits, claiming a copyright in the newscast. This is a direct result of Vanderbilt University's decision to videotape and index each nightly newscast without making payment to CBS.[11] The university argued that the free speech and free press clauses of the First Amendment to the United States Constitution guarantees the public the right to receive information and ideas, and this concept of basic freedom should not be abridged by copyright laws. No decision has been handed down in the Vanderbilt case. Again, we would suggest that the laws are changing in the area of copyrights, and a violation might expose the professor or the institution to liability.

In the academic world it is called "plagiarism," but in the business world it is called "industrial piracy." The college professor could well face personal exposure in both of these areas. For instance, plagiarism could be viewed as a violation of copyright laws and expose the professor not only to academic sanctions but to a claim of damages by the original writer or researcher. Many professors are consultants to labor and industry. Industrial secrets might also be protected by patents or common law copyright, and their theft could well be deemed a breach of a contractual relationship between a professor and his employer.

There is the added question of who has the right to ownership of data or inventions developed pursuant to research grants. The professor receiving such a grant and the institution would be wise to settle this issue prior to the commencement of research. If the professor is, in fact, an employee, the normal rule of thumb would be that the work product enures to

the benefit of the employer. But where the professor, with the permission of the institution is working pursuant to a personal grant from an outside federal or private agency, it might be argued that the rights of the institution itself in and to the results of the project are limited. Whatever the rights of the parties seem to be in this situation, they can and should be fully defined (or modified) by contract or written agreement.

IN LOCO PARENTIS IS NOT DEAD

In fact, as mentioned above, the faculty member or college administrator might even have a higher and greater duty to protect the student than does that student's parents. Not being part of the familial relationship would seem to impose upon the professor the added burden of objectivity in all interpersonal relationships involving students. A parent can be unreasonable in making demands upon or in the supervision of a child. But this unreasonableness is almost supportable by the very special relationship a parent has with the child and by the parent's right to make subjective determinations relating to the welfare of the child. We would suggest that the university or college professor is not given similar latitude.

Most professors and administrators find themselves caught in what is really a logical inconsistency not of their own making. On the one hand students claim adult rights (and in fact by statute have been granted those rights at age 18 in many jurisdictions) and demand co-equal rights of governance in both the academic and administrative areas. But if that student suffers physical or emotional distress, flunks out of school, is arrested, or is in any way unhappy with the educational experience, out come the banners saying that the professor and/or administration have a legal and moral obligation to protect students from these traumas.

The failure to properly supervise a dormitory could well expose a faculty member to personal liability. For instance, assume that the institution's policy was to require identification of anyone entering the buildings and the faculty member (or resident assistant) fails to take these precautions. It can be argued that a student signs a dormitory contract after receiving at least some assurances that his or her person and property will be secure in that facility and that the dormitory regulations will, in fact, be enforced. What happens if a student is criminally assaulted due to the failure of the dormitory "manager" to follow prescribed procedures?

The Supreme Court of Maine has recently concluded that a private secondary school has a great responsibility to safeguard its students.[12] In that case, a 16-year-old girl was raped by an unidentified intruder, and the evidence seemed to indicate that not only had the doors not been properly secured, but a security guard had noticed large footprints in the snow leading to a rear kitchen door. The court did not seem to take into account the fact that the student was a minor, with the exception of stating that because young boys and girls were living in dormitories, the school "must assume the dual role of teacher and family to its students [and] . . . the kind of environment that fosters their physical and emotional well being." The court rested its decision on the fact that the student was considered a "business invitee" to whom the school and its employees owed a duty to exercise reasonable care in taking such measures as were reasonably necessary for the student's safety. Legally speaking, a business invitee might be

someone with whom you have a casual business relationship—certainly not the relationship you *thought* you had with the student.

The significance of the Maine decision is that the court clearly determined that even on the basis of a "business invitee" relationship (which, we would submit, would impose even less of a duty of care than an "in loco parentis" relationship), an institution and its employees have a definite duty to protect the person and property of student residents. Since the Maine court seems to have rested its decision on this "business invitee" theory, the decision could logically be extended to all students regardless of whether they had reached their majority.

The school in the Maine case was located in a rural community with an almost nonexistent crime rate. It is reasonable to assume that dormitory security in an urban area would impose a much greater burden of care upon the institution and its employees. Finally, in many institutions of higher education, a student is compelled to live in a dormitory. Although this paper does not presume to explore the legality of such regulations, it would seem that this requirement that students live "on campus" imposes an even greater burden upon the institution.

So long as a faculty member is acting pursuant to university policy, he or she would most probably be protected by the institution. It is equally probable that should a faculty member fail to follow university policy with respect to the security of students and their property, the faculty member will be subjected to personal responsibility.

EXPERIMENTS AND RESEARCH

A colleague, as an undergraduate at a northeastern school, was asked to participate in certain psychological experiments involving stress and confrontation. He signed the requisite release and attended the "session." Needless to say, it was a good deal more than he expected, but the experiment was monitored by experienced and trained professionals and our friend, in retrospect, feels that the entire situation was under such control that it could not possibly have gotten out of hand.

However, should a professor attempt to conduct experiments using human guinea pigs, the institution (and that professor) would do well to assure that all possible and conceivable safeguards were followed. An institution or individual failing to follow these safeguards might be responsible for the physical or emotional trauma suffered by students or any other volunteers. The only guidance one can give the professor or the institution is that experiments involving human subjects should *never* be conducted unless both the institution and the faculty member are satisfied that the experimentation is being conducted by persons appropriately qualified and with adequate safeguards. A qualified researcher, by remaining within the "state of the art," reduces his personal liability exposure.

In a recent decision, the New York Court held that a state university could not be held liable for the death of two college students who drowned in a fierce and unexpected storm on a lake while participating in an overnight canoe trip.[13] The court said that the legal cause of the deaths was the unforeseen weather conditions rather than any negligence on the part of the university. But this case talks about *unforeseen* conditions. What if a

faculty member leading a group of students on a field study knew or should have known of inherent dangers and failed to take necessary precautions or to warn student participants? Or, what if a chemistry teacher failed to check the safety of lab equipment with a resulting explosion severely injuring a student? And, finally, what about the coach who either supplies his team with damaged equipment, does not take proper precautions for his players' physical well-being, or who even pushes certain players beyond all levels of human endurance? The above acts of commission or omission would subject the institution and most probably the individual faculty member or coach to liability.

Many research projects are funded through governmental or foundation grants. Often, the faculty member making application for this grant has made certain representations with respect to the way it will be administered. Should the faculty member fail to administer the grant pursuant to those representations or pursuant to restrictions which might be contained in the grant itself, there could be an imposition of personal liability not only for the trauma to others but also for breach of contract.

It has been argued that a contract, both expressed and implied, exists between the student and the institution.[14] Part of this contract would include the admissions application, the school catalog or syllabus, representations made by recruiters, the student handbook, including rules and regulations, along with an implied agreement that in return for accepting a certain fee, the institution agrees to at least attempt in good faith to educate the student. The institution has a great deal of latitude in altering the terms of this "contract." At least one court has held:

> "A student contracts with a college or university for a number of courses to be given during the academic year [and] the services rendered by the university cannot be measured by the time spent in the classroom."[15]

However, there are certain duties and responsibilities of faculty members with which no one could disagree. For instance, a faculty member would normally be expected to properly prepare grade lists and submit them seasonably to the administration for recordation. In fact, most, if not all, campuses require this of faculty members either through rules in a faculty handbook, departmental policy, or written memoranda. Assume that a faculty member not only fails to supply these grades but also destroys all records relating thereto, thus resulting in the student not receiving course credit, not graduating, not finding a job, or not being admitted to graduate school. The professor should be held to those standards which could normally be expected from members of his or her profession. These standards might be set forth by written rules and regulations or by custom and usage. It is to be hoped that educators would have an innate sense of what was required from them in fulfilling their professional duties and would also agree that should they fail to satisfy those duties, they would be subject to legal action by either the institution (i.e. dismissal or nonrenewal), or the student (by a lawsuit claiming interference with a contractual relationship), or both. And if it could be shown that the teacher's grading policies were affected by the sex, race, national origin, or age of the student, there is no doubt that a civil rights violation would be claimed.

There have been a number of lawsuits filed by students against faculty

members and/or institutions as a result of grading practices or procedures; most schools don't even have a formal procedure through which the student can appeal a faculty decision. Yet a professor might well be faced with a challenge to his subjective determination of a grade. In a recent case, the Federal District Court for the Western District of Missouri[16] said that where an institution had extended (albeit gratuitously) an appeal mechanism for students wishing to challenge academic dismissal, those procedures must be followed. However, the court was most supportive of the right of faculty to make subjective determinations and even went so far as to uphold the position that a valid criterion for grading at a medical school was the "attitude" of the student. The court did state that a student cannot be dismissed for constitutionally impermissible reasons such as the exercise of his right of free speech, race, sex, religion, age, etc. But great weight must be given to the determination of trained faculty members in cases involving fairness or appropriateness of grades.

PERSONAL EXPOSURE TO CONSTITUTIONAL CLAIMS

To tell a college administrator or faculty member that the United States Constitution has "come to the campus" would be stating the obvious. In most institutions, much of the pending litigation involves real or alleged violations of either substantive or procedural constitutional rights. In the area of publicly supported universities, there is no doubt that an administrative or faculty action falls under the purview of Section 1983 of Title 42 of the United States Code, part of the so-called "Civil Rights Act." The distinction between public and private institutions should not be relied upon to exempt the private institution from the jurisdiction of the federal court system. What with the gradual incursion of both federal and state governments into the area of private education, such as in areas of grants, scholarship, loans, construction monies, tax exemptions, and the like, the distinction between public and private institutions for purposes of the applicability of the Civil Rights Act and the United States Constitution has rapidly eroded.[17]

Challenges to a school's authority and ways of doing business have been mounted in areas ranging from suspension of students from public schools,[18] procedural and substantive rights of tenured and nontenured faculty members,[19] to the aforementioned rights of students to be fairly graded.[20] For many years, institutions and/or their employees acting within the scope of their institutional authority, have claimed absolute protection by reason of the Doctrine of Sovereign Immunity,[21] but the doctrine's applicability to individuals has been defined and modified by the recent decisions of *Scheuer v. Rhodes*[22] (the "Kent State Case") and *Wood v. Strickland.*[23] In *Scheuer,* the U.S. Supreme Court held that there existed a *qualified* immunity for the benefit of all the defendants in the action, but that the case should be returned to the district court so evidence could be developed regarding whether or not immunity would apply. The court further held and so directed the district court that immunity would only attach depending upon the scope of discretion and the responsibilities of the parties asserting the immunity. Especially important would be the circumstances as they reasonably appeared at the time of the action on which a liability was sought to be based. The Supreme Court seems to have

imposed a burden of good faith upon the governor of Ohio and the Ohio National Guard and, in essence, was saying that should it be shown that they were acting *within* their discretionary powers, in good faith, and not in a highly reckless manner, they would be protected by the Doctrine of Sovereign Immunity.

In the *Wood* decision, the Supreme Court held that school officials are entitled to a qualified good faith immunity from liability for damages claimed pursuant to the Civil Rights Act.[14] The immunity was qualified to impose personal liability if the school officials knew and *reasonably should have known* that the action they took within their sphere of official responsibility would violate the constitutional rights of the students affected or if they took the action with a malicious intention to cause a deprivation of such rights or other injuries to the student.

The *Scheuer* and *Wood* cases come to grips with the parameters of protection afforded to individuals acting within the scope of their authority. Needless to say, a college or university employee should not be able to assert the protection of sovereign immunity in his or her private affairs. The applicability of the doctrine to the institution itself has come under increasing fire in recent years. Legislative and court determinations of its scope are being made regularly. Local counsel should hence be consulted.

CIVIL RIGHTS VIOLATIONS

It goes without saying that freedoms of religion, speech, the press, assembly, and privacy extend to the campus. In fact, in the academic sphere these freedoms may be even broader than in the normal social context. Universities and colleges were and are formed to foster the free expression of opinions. While a violation of personal freedoms is repugnant in any situation, might it not be worse in an environment which by its very existence creates and demands full and free discourse? As mentioned above, the rights of an individual to these freedoms is sometimes tempered by the rights of another individual or society as a whole, but no one can disagree that it is manifestly improper for anyone, including a college administrator or professor, to attempt to stifle these rights.

For a faculty member to unconstitutionally prohibit anyone's exercise of these basic freedoms would most certainly expose him or her to liability. The frightening thing is that even if a professor is following institutional policy, he might possibly be deemed to know (or maybe *should* have known) that these policies are incorrect, in violation of another individual's constitutional rights. We hope that this will not lead to any massive civil disobedience on the part of university professors. It would be far better for a professor to bring to the attention of the administration rules or policies which, in his or her opinion, were constitutionally repugnant either as written or as applied in a certain situation. One would assume that an intelligent discourse would follow and that the institution would have to either re-think its rules and policies or justify them.

CONFLICTS OF INTEREST

Professors, especially those in "public" institutions, might by their actions be subject to a claim that they had violated a state, civil, or crim-

inal statute prohibiting "conflicts of interest." The post-Watergate era has seen a plethora of legislation in our various states requiring full disclosure of financial assets of public officials and disclosure of any conflicts of interest. Failure to make this disclosure might result in civil or criminal liability. In the academic context, the problem arises because many faculty members serve two masters. With or without the specific permission of the institution, certain professors might, for example, act as publishers' or manufacturers' representatives. Even though it is unlikely that a person solely entrusted with teaching responsibilities could be considered a "public official" (and hence fall under the purview of conflict of interest legislation), professors with management functions should be aware that by their very assumption of this management mantle in a public institution, they may be considered public officials. Since many institutions have no policy on additional compensated employment or because an existing policy might not be in conformance with a recently passed state law or executive order, the professor who is compensated (either directly or indirectly) by an outside employer would do well to check on his status. Although conflict of interest legislation traditionally affects "public" employees, it might well extend to private individuals who deal with public agencies. The restrictions against conflicts of interest may vary widely from state to state.

SAFEGUARDS

This paper has not been written in an attempt to shock the faculty member by disclosing his or her potential liabilities. By the same token, the authors obviously have not been able to point out *every* potential liability. Remember that a faculty member is subject to, at the very least, the same rules and regulations applying to any member of society. The academic context does present certain unique problems—the people with whom the professor deals are generally more sophisticated and inclined to litigation, for example. How then can a faculty member at least begin to protect himself, within his academic world, from liability? It is suggested that the following points would serve as a bare outline of procedures or "things to keep in mind:"

1. Above all, be a "reasonable" person. If you are acting in good faith and everyone knows it, you minimize the chance that a lawsuit will be brought against you at all and, even if it is, you will maximize your chances for personal exculpation.

2. When in doubt, contact the next highest administrative authority. (But don't be afraid to make decisions at your *own* level. After all, isn't decision making part of everyone's job description?) Hopefully, the problem will travel rapidly up the administrative ladder and reach the desk of the institution's liaison with legal counsel. That administrator should maintain files of prior legal memoranda. It might not even be necessary to contact legal counsel. Problems have a way of reappearing. Maybe the legal issues posed by your request were researched and resolved last week.

3. Don't be afraid to request aid of legal counsel, even in the earliest stages of a problem. Most people have a visceral reaction as to when a situation is likely to flare. If you sense a protracted legal problem, you can protect yourself and the institution by seeking guidance on procedural and substantive issues at the earliest possible time.

4. When dealing with a "hot" issue, try to have a third party present. The third party might be able to testify that you in fact had *not* acted improperly or that you had been misquoted. Keep and maintain written memoranda of conferences and telephone conversations. You never can tell when someone is going to claim that he never met with you at all. Use tape recordings—they are even more reliable than third party witnesses. But be careful to disclose to the parties present that the conversation is, in fact, being recorded. Many states have laws prohibiting the unauthorized recording of telephone conversations or conferences.

5. Remember that conversations with students and/or colleagues are not necessarily private or confidential. You might be quoted. Other people also have a right to free expression. Almost everything is subject to subpoena, even the most confidential memo.

6. If you feel strongly about a decision or a possible action, and you are convinced that you acted reasonably, in good faith, and without prejudice, don't be afraid to "stand fast." Don't apologize about the consequences of tough decisions once they are made.

7. It takes a mature and intelligent person to admit that he is wrong; but if you are not wrong, don't say that you are just to end an uncomfortable conference or telephone call. This admission, no matter how obtained from you, can and will be used against you in an administrative or court proceeding and can solidify liability in a lawsuit.

8. Always presume that there are two sides to every story. When in doubt, grant a meeting (see suggestion four), or pursuant to university rules or advice of counsel, a full hearing on an issue.

9. Remember that a student or anyone else can appeal your decision or action to a higher administrative authority, panel, or court. Don't let this scare you—you have rights, too.

10. Accept the fact that people make mistakes. We are a complex and increasingly litigious society. It is always better to settle problems at the lowest possible administrative level than to escalate the confrontation. Litigation can result in ruinous division within a department, college, or university. Remember that the highest calling of a lawyer (and any individual) is to prevent litigation and to foster increased communication and amicable resolution of disputes.

Footnotes

1. *Shirley v. Chagrin Falls Exempted Village Schools Board of Education,* et. al. Civil Action No. C73-332. U.S.D.C. (Northern District of Ohio, Eastern Division, September 23, 1974).

2. *LaFleur v. Cleveland Board of Education,* 326 F. Supp. 1208 (N.D. Ohio 1971) vac and rev 465 F. 2d 1184 (1972); aff'd 414 U.S. 632, 39 L Ed 2d 52 (1974).

3. IRS Regulation §31.3401(c)-1(b).

4. Prosser, *Law of Torts* (4th Ed.) §111.

5. *New York Times Co. v. Sullivan,* Ala. 376 U.S. 251,11 L Ed 2d 686, 95 ALR 2d 1412 (1964).

6. *Rosenblatt v. Baer,* 363 U.S.75 (1966); See also *Reaves v. Foster,* 200 So. 2d 453 (Miss. 1967).

7. *Time, Inc. v. Hill,* 385 U.S. 374 (1967).

8. Prosser, *Law of Torts* (4th Ed) §118.

9. 20 USC 1232g et seq.

10. *Williams & Wilkins Co. v. U.S.* Ct Cl, 487 F. 2d 1345 cert gr 94 S Ct 2602 (1974), aff'd 43 L.W. 4314 (February 25, 1975).

11. *Columbia Broadcasting System v. Vanderbilt University,* Civil Action No. 7336 F. Ed. in the U.S. District Court for the Middle District of Tennessee, Nashville, Division.

12. *Schultz v. Gould Academy,* A. 2d (Maine 1975).

13. *Mintz v. State* 362 N.Y.S. 2d 619 (1975).

14. See Janisch, *Legal Liability for Failure to Educate,* published in the proceedings of a conference on the "University and the Law", The Association of Atlantic Universities (Halifax, Nova Scotia) and Cerra, "If a School Flunks, Must Student Pay?", *New York Times,* May 4, 1975 (Pg. 1 of Education Supplement Section).

15. *Paynter v. New York University,* 314 N.Y.S. 2d 676 (1970), 319 N.Y.S. 2d 893 (1971).

16. *Lukacs v. The Curators of the University of Missouri, et al,* Case No. 74 CV 109-c U.S.D.C., Western District of Missouri, Central Division (July 19, 1974).

17. See, for instance, *Isaacs v. Board of Trustees of Temple University,* 43 L.W. 2241 U.S.D.C. (Pa., Eastern Dist., November 11, 1974).

18. *Goss v. Lopez,* ____U.S.____, 43 L.W. 4181 (1975).

19. eg *Roth v Board of Regents* (Wisconsin) 446 F. 2d 806, 404 U.S. 909, 30 L. Ed. 2d 548 (1972) and *Sindermann v. Perry,* 430 F. 2d 939, 403 U.S. 917, 29 L. Ed 2d 694, Aff. 408 U.S. 593, 33 L. Ed 2d 570 (1972).

20. *Lukacs v. The Curators of the University of Missouri, et al, supra.*

21. i.e., the sovereign can do no wrong. In other words, by reason of its sovereign position, a legal entity is exempt from liability, even for negligence. Some states, by general legislation, allow themselves to be sued in certain instances.

22. *Scheuer v. Rhodes* (Ohio) 94 S. Ct. 1683 (1974).

23. *Wood v. Strickland,* 43 L.W. 34 (1975).

24. eg See 42 USC 1983—The most cited section of the Civil Rights Act in litigation involving institutions of higher education.

Chapter IV

Developing a Faculty and Staff Personnel Records Policy

Richard J. Sensenbrenner and Bruce M. Richardson

The administration of campus policies governing access to personnel records has encountered increasing challenges in recent years. Not only have demands to disclose or keep confidential information contained in personnel records increased, but the policies themselves are being challenged on the campus and in the courts. The purpose of this paper is to acquaint the campus administrator with important considerations in both policy and law which will assist in successfully maintaining a policy which regulates access to personnel records.

Although the campus administrator should be aware of the impact of local, state, and federal laws outlined in the following section, generally, the law leaves to the institution a great deal of discretion concerning the openness or confidentiality of personnel records. Thus, in most situations, the principal source of law governing access to personnel records will be the policy which has been adopted by the institution itself. It is, therefore, important that the policy be carefully considered to meet the needs of the campus. The development of an intelligent, well-considered policy will both reduce administrative headaches in handling demands to open or close personnel records and increase the likelihood of success in the face of challenges to the policy. In developing a policy, the following should be considered:

A. Identification of the institution's purposes for maintaining personnel records.

B. In light of these purposes, identify the kinds of documents and confidential information which should be maintained.

C. Determine the public or private nature of the information.

D. Identify

   1. those who should be permitted access to the information;
   2. the specific documents and information which may be examined;
   3. the circumstances under which access will be accorded, including:
      a. the purpose of the examination;

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b. the availability of access through alternative means including a summary of campus personnel from the records.

c. the need for the employee's permission;

d. the need for an administrative or judicial order directing access;

e. the presence of campus personnel during the examination;

f. the time and place of the examination;

g. provisions for or prohibitions against copying the document, and

4. restrictions on the usage of documents and information obtained.

E. Identify the circumstances under which material may be added to or removed from the file.

PURPOSE FOR ACCESS

One of the critical considerations is the purpose of the request for access to the records. Courts, when called upon to determine whether information should be disclosed, frequently determine the issue through a process of weighing the interests in favor of disclosure against the interests opposed to disclosure. A consideration of these potential interests is therefore helpful in developing a records policy. Some of these interests are identified in the following outline.

A. The employee:

1. Privacy (nondisclosure to third parties): interest in maintaining privacy of information concerning personal life.

2. Accuracy (disclosure to employee): interest in accuracy of information by allowing the employee to challenge and correct inaccuracies.

3. Relevancy (disclosure to employee): interest in challenging and removing information which has no connection with the employment relationship.

4. Improvement (disclosure to employee): interest in knowing strengths and weaknesses identified in documents to facilitate improved performance.

B. The students:

1. Evaluating teachers (disclosure to students): interest in knowing background, ability, and performance of those who may teach them.

2. Informing student body (disclosure to student press): interest in informing student body concerning the conduct of the institution.

C. The campus administration:

1. Candid evaluations (nondisclosure to employee or third parties): interest in obtaining frank recommendations or evaluations of the employee and the employee's performance.

2. Innocent reputations (nondisclosure to third parties): interest in protecting the reputations of those against whom unproven allegations of misconduct have been made.

3. Conformance to condition of receipt of information (nondisclosure to employee or third parties): interest in abiding by a precondition that material received in confidence will be kept confidential.

4. Maintenance of a legal privilege (nondisclosure to employee or third parties): interest in restricting access to potentially defamatory material to only those who have a legitimate need to know in order to maintain a "qualified privilege" as a defense to a lawsuit for defamation; or interest in maintaining confidentiality of material in order to assert the official records privilege, an evidentiary privilege recognized in many states.

5. Protecting another's interest (disclosure or nondisclosure): interest in maintaining another's interest: e.g., an employee's interest in privacy or accuracy.

D. Law enforcement agencies:

Law enforcement (disclosure to agency): interest in obtaining information necessary to enforce the law.

E. Federal and state agencies:

1. Compliance with contract (disclosure to agency): interest in ensuring compliance with contract terms and conditions.

2. Compliance with law (disclosure to agency): interest in ensuring compliance with the law.

F. The public:

Evaluating performance (disclosure to public or private donors): interest in being informed and able to evaluate performance of those supported by public or private monies.

The most common example of the weighing-of-interests process is found in the judicial determinations made under state and local "freedom of information" acts. These acts typically provide for resolution of the public or private nature of the document through a process of weighing the interests in favor of disclosure against the interests opposed to disclosure.

ADDING, CHALLENGING, REMOVING

Another area of sensitivity in many personnel records policies is the provisions for adding, challenging, and removing documents. The importance of these provisions is largely dependent on the purpose for which the files are maintained. If the file is the repository of documents which will form one basis of significant personnel decisions the provisions will be important.

The needs and desires of the institution will largely determine the nature of these provisions. The following discussion suggests some of the policy options which are available.

A. Adding documents to the file. Requests to add documents to a file may come from three sources: the employee, the employee's supervisors, and third parties such as students and the public. The policy responses to these requests include an unconditional prohibition, an unconditional authorization, or a conditional authorization. Generally, campus policies which address the issue impose the least restriction on supervisors and the most restriction on third parties. Sample policy options are as follows:

   1. Prohibition: "The (source of request) may not add or direct others to add documents to the file."

   2. Unconditional authorization: "The (source of request) may direct the custodian of the file to add any document whatever to the file."

   3. Restricted authorization: "The (source of request) may direct that the custodian of the file add a document which relates to the employee's performance at the campus."

   4. Restricted authorization: "The (source of request) may request the custodian of the file to add a document to the employee's file. The request shall include: (a) a copy of the document; (b) a statement of the reasons for requesting its inclusion: and (c) a statement of the document's relevance to the purpose of maintaining the file. The document may be added if the custodian, after reviewing the document and supporting information, finds that the document will materially aid in the purpose for which the file is maintained. The decision of the custodian shall be communicated to the (source of request or employee or both). The decision of the custodian shall be final." (Or, "The decision of the custodian may be appealed to the (custodian's supervisor or other designated responsible officer) who may review the document and supporting information and make a determination. The decision of the (supervisor or other responsible officer) shall be final.") Documents may also be added to the file automatically without a request being made. A policy may provide that certain documents generated in the course of significant personnel processes such as retention, tenure, and promotion be automatically added to the file.

B. Challenging documents in a file. If the personnel file is open to the employee, the campus may wish to provide a means to notify the employee of documents as they are added and to challenge the documents. The following options are among those available in developing such a procedure:

   1. A means of notifying the employee may be provided. This notification may immediately follow the request to add a document to the file but before the decision is made on the request. Allowing the employee to respond in writing before the decision to add the document

would allow the custodian to have the benefit of two points of view in making the decision. However, the notification could come after an initial determination has been made that the request is not lacking in merit in order to relieve the employee from having to respond to all attempts, however lacking in merit, to add documents to the file.

2. The grounds for challenge of a document could include (a) that the information contained in the document is inaccurate, or (b) that the document is not relevant to the employee's performance as an employee of the institution.

3. The challenge may be limited to a written response or may take the form of an oral presentation. If an oral presentation is authorized the procedure should specify who may be present and the procedural rules which should govern.

4. The disposition of the challenge may be .

   a. that the employee's written objection is simply included in the personnel file with the challenged document OR

   b. that the challenged document is either retained as is, retained as modified, or removed entirely.

5. Provisions may be included for (a) notifying the employee of the decision, (b) the right to appeal the decision, and (c) the finality of the decision.

C. Removing documents from the file. In addition to removing a document from the file after a successful challenge, the policy may include additional provisions for removing documents. Removal may be accomplished automatically as well as by request. Outdated or superseded documents may be removed automatically. Requests may come from the employee, the employee's supervisors, and third parties. The policy may prohibit removal or conditionally authorize removal with procedural options similar to those outlined for the adding of documents.

On occasion, the courts have addressed the issues with regard to adding, challenging, and removing documents. The Fifth Circuit Court of Appeals has held that the depositing in three instructors' personnel files of an uncomplimentary memorandum charging neglect of duty for an unexcused absence from campus did not, by itself, violate the instructors' constitutional rights (*Collins v. Wolfson* 498 F.2d 1100 (5th Cir. 1974)). However, the Eighth Circuit Court of Appeals has held that the placing of written charges of racism in a faculty member's personnel file where the faculty member was not retained imposed a stigma upon the employee depriving him of liberty. The court said that the written charges would diminish his chances of obtaining other employment since prospective employers would have access to the file. Such a deprivation of liberty, the court held, required a notice and a hearing to provide the employee an opportunity to clear his name (*Wellner v. Minnesota State Junior College Board* 487 F. 2d 153 (8th Cir. 1973)).

THE LAWS WHICH AFFECT ACCESS

Not only is it important to be aware of the considerations involved in developing a reasoned personnel records policy but it is also important that campus administrators be generally familiar with the laws which affect access to personnel records. The sources of these laws are federal, state, and campus.

Whether particular laws apply to an institution depends in large part on the public or private nature of the institution as well as such variables as the institution's involvement in federally-funded programs. Since laws vary among the states and regulations and policies differ among institutions, discussion of these areas is necessarily general. Legal counsel should be consulted for the effect of specific laws on the confidentiality of personnel records at any particular institution.

FEDERAL LAW

A. The United States Constitution. There is no constitutional requirement that personnel records of public or private institutions be either open or closed. However, arguments have been made and undoubtedly will continue to be made that some requirement of the United States Constitution dictates a policy one way or the other. Generally, the argument for open personnel records is based on the due process clause of the 14th Amendment, and the argument for closed files based on the constituional right of privacy.

The due process clause by itself does not mandate open personnel records *(Board of Regents v. Roth* 408 U.S. 564 (1972); *Burdeau v. Trustees* 507 F. 2d 770 (9th Cir. 1974)). However, should access be denied to an employee when a state statute or campus regulation grants to all employees access to personnel records, the employee might successfully assert denial of not only due process but also equal protection of the law both guaranteed by the 14th Amendment.

Neither does the constitutional right of privacy mandate that personnel records be closed. However, the administrator should be sensitive to the fact that some information contained in personnel records is private in character and should not be disclosed to the public.

B. Federal Statutes, Executive Orders, and Regulations. Perhaps the greatest incursion into campus policies of confidentiality of personnel records is that resulting from federal laws which seek to enforce prohibitions against discrimination on the basis of race, color, religion, national origin, or sex. Federal laws prohibiting discrimination on the basis of age, and laws requiring affirmative action in the employment of the handicapped, disabled veterans, and veterans of the Vietnam era may also have an impact. These laws affect the personnel records of the campus either because of contractural obligations which come with acceptance of federal funds or because the personnel practices of the campus affect interstate commerce.

1. *Executive Order 11246* (30 F.R. 12319 (1965) as amended by Execu-

tive Order 11375 (32 F.R. 14303 (1967)) with implementing regulations in Title 41, Code of Federal Regulations, Chapter 60 (cited hereafter as 41 CFR 60).

This presidential directive, applicable to all institutions with federal contracts of over $10,000, prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Violation may result in revocation of current contracts, delay of new contracts, or impairment of eligibility for future contracts. Enforcement responsibility for this law has been given to the Office of Civil Rights (OCR) which may conduct investigations and compliance reviews. The Equal Employment Opportunity Commission (EEOC) may also conduct a compliance review or investigation when individual complaints are received.

In the course of these investigations and compliance reviews OCR or EEOC may request or demand access to campus personnel records. The administration should be aware of the campus' legal rights and obligations in the face of such demands.

a. Requirements of the Executive Order (11246)

1) Section 202 prescribes standard contract provisions to be included in federal contracts. Paragraph five obligates the institution contractor to "permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders."

2) The Executive Order also requires that the institution contractor having such a contract file compliance reports containing information "as to the practices, policies, programs, and employment statistics of the contractor . . . and shall be in such form, as the Secretary of Labor may prescribe" (Section 203 ,(a)).

b. Requirements of the Regulations (41 CFR 60)

1) The Code of Federal Regulations (CFR) contains further directives regarding access to personnel records for institutions which contract for federal monies.

a) 41 CFR 60-1.43 requires an institution contractor to permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying records which are "relevant to the matter under investigation and pertinent to compliance with the order." Information obtained in this manner may only be used in connection with the administration and purposes of the Executive Order and the Civil Rights Act of 1964. Thus, while the institution is required to permit access to its records, only those records which are relevant and pertinent may be inspected and copied with a further restriction concerning future use of the information obtained.

b) 41 CFR 60-1.7(a)(3) authorizes the federal agency to re-

quire an institution contractor "to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the (federal agency) deems necessary for the administration of the order."

2) A segment of the regulations called "Revised Order No. 14" (41 CFR 60-60) requires institution contractors (with 50 or more employees and a contract for supplies and services of $50,000 or more) to develop affirmative action programs (41 CFR 60-2 "Revised Order No. 4"). These programs may be audited under procedures contained in Part 60-60. Section 60-60.4 sets out the information required for each kind of audit and the restrictions which may be placed on confidential data used in the audit.

   a) For desk audits: alphabetic or numeric coding of data or the use of an index of pay or pay ranges is permissible (60.60.4 (a)).

   b) For on-site audits: "full access to all relevant data" is required (60-60.4 (b)).

   c) For off-site analyses: "all data determined by the compliance officer to be necessary" must be provided (60-60.4(c)).

      (1) Coding is permissible only if code is available to compliance agency.

      (2) If the institution believes any particular information is not relevant to compliance with the Executive Order," the institution may request a ruling by the agency contract compliance officer. An appeal from the ruling is provided.

      (3) Pending a final ruling, the information must be made available with restrictions on access and copying and must be returned if the ruling is that the information is not relevant.

   d) Information made available to the reviewing agency will be (41 CFR 60-60.4 (d))

      (1) nondisclosable to the public during the compliance review

      (2) thereafter may be subject to public inspection and copying as provided in the Freedom of Information Act (5 USC 552)

         (a) The institution contractor may identify information considered confidential and specify reasons why it should not be disclosed;

         (b) the contract compliance officer will make a determination; and

         (c) an appeal may be made from the officer's ruling.

c. Instructions in the *Higher Education Guidelines.* The *Higher Education Guidelines* issued by HEW October 1, 1972 discusses the institution's responsibility to provide OCR with adequate information in the course of compliance review (see *Guidelines,* Appendix I). "When the focal point of an investigation becomes an individual or class instance of discrimination, the examination of certain personnel records will in most cases be necessary." (App. I p.3)

1) Access "is limited to (OCR's) obligation to identify and eliminate discrimination prohibited by the Executive Order and to secure required affirmative action. The officer has no intention or authority to seek information for any other purpose." (App. I p.3)

2) "Failure to provide information or permit access to and copying of pertinent records constitutes non-compliance . . . and subjects the contractor to enforcement action, including a hearing before an independent hearing officer. During the course of an enforcement hearing, the contractor has an opportunity to contest (OCR's) determination as to the necessity and pertinence of information it seeks." (App. I p.4)

2. *Title VII of the Civil Rights Act of 1964* as amended by The Equal Employment Opportunity Act of 1972 (42 U.S.C. 2000e *et seq.*) with procedural regulations in 29 CFR 1601.

Title VII, which broadly applies to all institutions with 15 or more employees (42 U.S.C. 2000e (b)), prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex (42 U.S.C. 2000e (b)). EEOC has enforcement responsibility and may conduct an investigation only upon receipt of a charge of discrimination filed with the commission (42 U.S.C. 2000e-5). A lawsuit may be brought by the federal government or by the aggrieved individual in which the court may enjoin any unlawful behavior and order appropriate remedial action. (42 U.S.C. 2000e-5 (f),(g))

Access to personnel files in conducting the investigation is given to EEOC as follows:

> "(EEOC) shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against . . ." (42 U.S.C. 2000e-8 (a))

Restrictions have been placed on access to personnel records although these restrictions have been broadly construed. The EEOC may have access to evidence which:

a. "relates to unlawful employment practices" and

b. "is relevant to the charge under investigation." (42 U.S.C. 2000e-8 (a)).

In litigation brought by the EEOC under Title VII, the 10th Circuit Court of Appeals has recently held that a subpoena duces tecum requiring the production of "personal files and records both confidential and extremely sensitive:"

a. is enforceable even though no "probable cause" has been shown that the institution has violated the act; and that

b. what has been previously considered to be administrative "fishing exhibitions" is often permitted; and that

c. "administrative subpoenas may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose." (*EEOC v. University of New Mexico* 43 LW 2205, 8 FEP Cases 1037 (1974))

Also of interest is the decision of a federal district court which held that the EEOC may compel the production of information only by way of subpoena and not by way of compulsory written interrogatories (*EEOC v. Western Electric Company* 8 FEP Cases 595 (1974)).

Restrictions also exist on the use of information obtained in an investigation. Although EEOC is required by law to furnish information to a state or local agency charged under state or local law with fair employment practice law administration (42 U.S.C. 2000e-8(d)), it is unlawful for any officer or employee of EEOC "to make public in any manner whatever" any information "prior to the institution of any proceeding under (Title VII) involving such information" (42 U.S.C. 2000e-8(e); 29 CFR 1601.20).

3. *Equal Pay Act of 1963* as amended by the Education Amendments of 1972 (29 U.S.C. 206 (d)) with official interpretations in 29 CFR 800.

The Equal Pay Act of 1963 applies to all institutions (29 U.S.C. 203 (d)) prohibiting discrimination in salaries on the basis of sex (29 U.S.C. 205 (d((1)). Enforcement responsibility has been given to the Wage and Hour Division of the Department of Labor which may conduct periodic reviews of a campus' salary practices or may review such practices upon receipt of a complaint. Suit may ultimately be brought by either the Secretary of Labor or by the aggrieved individual with the court enjoining unlawful behavior and ordering other appropriate remedial action. (29 U.S.C. 206 (d) (3)).

The law requires that payroll records including such information as name, home address, sex, and general payroll information (listed in 29 CFR 516.2) be kept. The law authorizes access to personnel records and contains restrictions as to their use as follows:

a. "(The Wage and Hour Division) may investigate and gather data regarding wages, hours, and other conditions and practices of employment . . . and may enter and inspect such places and such records (and make such transcriptions thereof) . . . as (it) may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of this chapter." (29 U.S.C. 211 (a); see also (c))

b. "(The Wage and Hour Division) may enter establishments and inspect the premises and records (and) transcribe records . . .".

"(R)ecords and other information obtained from employers and employees are treated confidentially." (29 CFR 800.164)

4. *Age Discrimination in Employment Act of 1967* (29 U.S.C. 621 *et seq.*) with regulations in 29 CFR 850 and official interpretations in 29 CFR 860.

   This act prohibits discrimination in employment on the basis of age against those persons "who are at least forty years of age but less than sixty-five years of age." (29 U.S.C. 631) The act applies to states, political subdivisions of states, any agency or instrumentality of a state, and persons engaged in an industry affecting commerce which has twenty or more employees employed in twenty or more calendar weeks (29 U.S.C. 630 (b)). In addition to remedies under the Fair Labor Standards Act, an aggrieved individual may bring a civil suit "for such legal or equitable relief as will effectuate the purpose of this act."

   In order to enforce the act, the regulations require the keeping of certain personnel information for specified period of time (29 CFR) 850.3). Records containing such information "shall be made available for inspection and transcription by authorized representatives of the administrator (of the Wage and Hour and Public Contracts Divisions) . . ." (29 CFR 850.6)

5. *Rehabilitation Act of 1973* (29 U.S.C. 793) with regulations in 20 CFR 741.

   This act, in pertinent part, requires federal contracts, "for the procurement of personal property and nonpersonal services (including construction)" in excess of $2,500 entered into by the federal government to require the party contracting with the federal government and any subcontractor whose subcontract is in excess of $2,500 to "take affirmative action to employ and advance in employment qualified handicapped individuals . . ." (29 U.S.C. 793 (a)) Aggrieved individuals may file complaints with the Department of Labor who "shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant . . ." (29 U.S.C. 793 (b))

   Depending on the size and duration of the contract, varying requirements exist for the "affirmative action clause" of the contract (20 CFR 741.3). Access to personnel and other records pertinent to evaluating compliance with the affirmative action clause of the contract or subcontract must be provided to authorized government investigators. Significantly, "information obtained in this manner shall be used only in connection with the administration of the act." (20 CFR 741.52)

6. *Vietnam Era Veterans Readjustment Act of 1974* (38 U.S.C. 2012)

   This act requires that all federal contracts in the amount of $10,000 or more "for the procurement of personal property and nonpersonal services (including construction)" contain a provision "requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era." (42 U.S.C.

2012 (a)) Aggrieved veterans may file complaints with the Department of Labor "who shall promptly investigate . . . and shall take such action" as appropriate. (42 U.S.C. 2012 (b))

Although as of this writing no implementing regulations have been adopted, the regulations will probably require access to personnel and other pertinent records with the limitation that the information so obtained may be used only in connection with the administration of the act.

7. *Freedom of Information Act* (5 U.S.C. 551 *et seq.*)

The campus administration should be aware of the possibility that personnel records and information obtained by the federal agency in the course of a compliance review or investigation may become available to the public for inspection and copying under the federal Freedom of Information Act. The act makes available to the public for inspection and copying certain records kept by federal agencies. The act authorizes federal agencies to adopt implementing rules:

a. 41 CFR 60-40 contains the rules for compliance agencies under Executive Order 11246.

b. 29 CFR 1610 contains the rules for EEOC.

The act, however, expressly excludes from disclosure:

> "personnel . . . files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

8. *The Family Educational Rights and Privacy Act of 1974* (Public Law 93-380; 88 Stat. 571), commonly known as the "Buckley Amendment," may affect personnel files if such files contain official records and data which directly relate to the employee's students. To avoid having to open personnel files to allow inspection of such records as required by the act, *remove that official data which relate to students.*

STATE LAW

A. State Constitution. State constitutional requirements are similar to federal constitutional provisions: Many rights provisions of state constitutions closely parallel the rights enumerated in the federal Constitution. Generally, the decisions of the United States Supreme Court concerning the federal constitutional rights assist in the interpretation of parallel state provisions. However, since the state constitution is a separate document with final authority for its interpretation vested in the highest state court, state constitutional decisions may exact requirements in addition or different from those of the federal Constitution. Although it is not likely that these additional requirements would mandate the opening or closing of personnel files, since it is legally possible, the institution should consult its counsel concerning the existence of additional state constitutional requirements. With regard to state constitutional provisions: state constitutions may have rights provisions

which do not appear in the federal Constitution. An example is California's recent right to privacy amendment (although a right bearing the same designation has emerged from the federal Constitution through judicial interpretation).

B. State statutes and administrative regulations. Unless a public institution has been granted independent authority in the state constitution to promulgate the laws by which it will be governed, public institutions are generally subject to the enactments of the state legislature.

1. State public records laws. Many states have enacted laws which require that records relating to the conduct of the public's business be open to public inspection. Such public records laws may apply to the official records kept by public institutions. Express exceptions may exist to the general rule of disclosure. These exceptions frequently include personnel files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

   Resolution of a specific case is often achieved through balancing the interest served by making the record public against the interest served by not making the record public.

2. Specific acts relating to personnel files of state employees or employees of the particular public institution. If the employees of the institution are state employees, laws may exist which relate to the personnel records of all state employees. Special enactments relating specifically to campus employees may also exist which regulate access to campus personnel records.

3. State fair employment practices laws. Most states have enacted state laws which prohibit various forms of discrimination. State civil rights or human rights commissions are frequently given enforcement responsibilities which include the power to conduct investigations into campus personnel practices. Legal counsel should be consulted for the impact that such powers may have on the confidentiality of personnel records. (See 42 U.S.C. Sections 2000e *et seq.* and 29 CFR 1601 for the correlation of such state laws with Title VII of the Civil Rights Act of 1964.)

4. Ancillary state statutes or common law principles developed by the state courts may affect a policy of confidentiality. The desire to be protected from charges of defamation by maintaining the existence of a qualified privilege bolstered by the limited access of persons to personnel records containing the allegedly defamatory material may be a motivating factor for such a policy. Likewise, confidentiality may be helpful in order to assert some evidentiary privilege.

5. Administrative regulations adopted pursuant to statute. Broad rulemaking authority may be delegated to a state agency by which specific rules and regulations are adopted governing personnel practices at public institutions.

CAMPUS LAW

The single most significant source of law relating to the confidentiality of personnel records may be the campus itself. Often sources of law beyond the campus will have relatively little that is comprehensive or definitive on the subject. Major sources of campus law are

A. Rules adopted by the governing body of the institution or by those with authority delegated from the governing body to adopt rules and formulate policy. This would include the campus' personnel records policy discussed earlier.

B. The terms and conditions of the contract of employment or appointment document.

C. A collective bargaining agreement, if any, may contain provisions concerning the confidentiality of personnel records.

Requests for Information. In any request or demand for access to information contained in personnel records, the institution should seek to be precise and to narrow the scope of the request or demand.

A. Those seeking access to the records should be asked to specify:

1. the precise information they seek;
2. the purpose for seeking the information;
3. who will have access to the information if it is given.

B. Agreement may be reached between the institution and those seeking access.

1. After balancing the interests served in disclosing the specific information against the interests in nondisclosure and after appropriate consultation with counsel, the institution may wish to disclose the information subject to agreed upon limitations.
2. Limitations which may be agreed upon between the parties include:
   a. The precise information which is sought
   b. How the information will be obtained
      1) By the institution
         a) furnishing a summary of the precise facts gleaned from the file documents or furnishing a certification that the file does not contain a certain fact;
         b) furnishing copies of the documents containing the information.
      2) By those seeking the information
         a) limitation of those who will be authorized to examine the file documents;

b) the time and place of the examination to avoid dissemination beyond those authorized;

c) supervision of the examination by a representative of the institution;

d) the prior removal of

(1) all documents which do not relate to the information which is sought;

(2) particularly sensitive documents such as preemployment recommendations, performance evaluations, and other documents received in confidence.

c. The specific and exclusive purpose for which the information will be used

d. Those who will have access to the information obtained

e. Prior notification and approval of the employee whose records will be examined.

3. Memorialize in writing the agreed upon conditions either through an exchange of correspondence with clear acceptance of the limitations or through an agreement document. Counsel should be consulted to approve any such written memorialization.

C. If no agreement is reached, those seeking access may request a court to order that they be accorded access.

1. Institutional counsel should be immediately contacted if the institution receives any communication from an attorney or a court concerning the demand to open personnel records. Subpoenas and court pleadings received by the institution should never be ignored.

2. The chances for a favorable resolution by a court are improved when

a. counsel has been contacted early in the controversy;

b. the interests of the institution in nondisclosure are precised with supporting documentation;

c. the institution can demonstrate reasonable attempts to resolve the dispute by suggesting alternate means of obtaining the information without compromising the institution's interest in confidentiality;

d. the institution is prepared to suggest to the court alternate means with appropriate limitations for inclusion in any court order.

D. Concerning compliance reviews or investigations by state and federal agencies:

1. Be familiar with the limitations on access and use of personnel records by the reviewing agency.

2. Consult counsel as soon as the institution receives notification of an investigation or review.

3. Seek to satisfy the agency as early as possible that the complaint, if any, is without merit or that the institution is fulfilling its contractual or statutory obligations.

4. Examine desired personnel records first to determine whether arguably privileged information is included.

5. Seek to educate those who will investigate concerning the confidentiality of personnel records in the campus setting.

6. Seek to reach agreement with the agency concerning

   a. prior removal of sensitive documents which do not relate to the purpose of the investigation;

   b. reasonable limitations concerning such matters as the kinds of documents which will be relevant to the investigation, who may examine the documents, the presence of a representative of the institution, where the examination will take place, deletion of identifying names on relevant confidential documents, ultimate disposition of information taken from the documents.

The likelihood that the interests of the academic community will prevail in issues which arise concerning access to personnel records is substantially increased when the campus has given careful thought to a policy governing that access. Careful consideration aided by competent legal advice can prevent many problems before they arise. In addition to a well-reasoned policy, the administrator should generally understand the federal, state, and campus law which affects access to personnel records. Advice of counsel may also assist in coming to understand these laws. Finally, when a request or demand for access to personnel records is received, the administrator should understand that such requests, although often broadly drafted, may be narrowed and refined through inquiry and negotiation. Although strict and absolute confidentiality of sensitive personnel records may be difficult to maintain in all cases, the campus' policy may prevail in a maximum number of situations when sound procedures, knowledge of the law, and intelligent response to demands for access are operative.

Chapter V

The First Amendment Freedoms of Speech, Press, and Association

Kenneth L. Ryskamp and Arthur M. Simon

It is no mere coincidence that the First Amendment to the U.S. Constitution is the FIRST amendment. The First Amendment freedoms are generally construed to have a "preferred status" within the context of the American constitutional law. As such, they are among the most highly venerated constitutional limitations upon the exercise of governmental power.

Although the language of the amendment itself would seem to imply that the individual guarantees set forth therein are binding as limitations upon the federal government only, nevertheless, it is now totally accepted that these First Amendment freedoms of speech, press, and association are also binding as limitations upon the various states via the Fourteenth Amendment due process clause.

However, although these freedoms are among the most fundamental personal rights and liberties protected by the Constitution, and although the First Amendment specifically states that Congress "shall make *no* law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble . . .", and although the Fourteenth Amendment due process clause likewise provides that *no* state shall deprive any person of liberty without due process of law, First Amendment freedoms are not absolute; they are not without limitation.

The underlying purpose of our constitutional system of government is to ensure the protection of our fundamental democratic ideals. However, these same democratic ideals impose both individual rights *and* individual responsibilities.

The application of these principles can easily be seen within the context of the campus community. Certainly, academic freedom and academic discipline (a limitation upon academic freedom) are both necessary to preserve an educational environment conducive to the free exchange of concepts and ideas. There must be a balancing of interests. The societal need for preserving academic freedom *also* requires the imposition of certain limitations thereupon.

This chapter will attempt to set forth some of the major problem areas faced by college administrators with regard to the First Amendment

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freedoms of speech, press, and association. As will soon become apparent, the resolution of these commonplace problems will usually not depend upon the letter of the Constitution itself, but rather upon the application of constitutional principles, and the consequent balancing of societal needs.

THE CAMPUS ENVIRONMENT AND THE SCOPE AND APPLICATION OF THE FIRST AMENDMENT

Unprecendented years of campus unrest occurred from 1964 to 1974. As a result, many new questions were raised concerning the application of the First Amendment on campus. Perhaps the most important of these questions was whether or not a standard which is maintained when applying the First Amendment "balancing test" to campus problems should be the same standard which is applied to community problems in general. Essentially, there have emerged three divergent views. The first view, the "restrictive view," provides that greater limitations must necessarily be imposed *upon the free exercise* of First Amendment rights, so as to preserve the greater degree of discipline which is necessary within the unique academic environment. On the other hand, the "free exercise view" states that greater limitations must necessarily be imposed *upon the college's power* to enact rules and regulations which interfere with the free exercise of First Amendment rights, so as to preserve the free flow of ideas basic to the maintenance of a proper academic environment. The adherents to this latter view also agree that the attributes of a campus community present situational problems which are clearly distinguishable from those within the general community. Nevertheless, because of the unique characteristics attributed to the academic environment, the proponents of the "free exercise" view state that there should be *less* and not *more* limitation upon freedom of speech, press, and assembly.

Finally, there is a third view. Simply stated, this third view rejects the underlying proposition that the campus is legally distinguishable from the general community. Therefore, no special standard should be maintained when applying the First Amendment balancing test to campus problems. The standard should be the same as that which is applied to community problems in general. Stated differently, persons neither gain nor lose any constitutional rights merely because they have enrolled as students in a publicly funded institution of higher learning.

Unfortunately, no one particular view is universally accepted throughout the United States. This presents a difficult problem for judges, educators, and students alike. However, the third view, as described above, is *probably* the most prevalent view today. The Supreme Court of the United States has clearly come to recognize that students are constitutionally protected within the First Amendment, and are therefore entitled to a reasonable degree of freedom as members of the academic community, and as members of the overall community. At the same time, however, the court is quick to remind us that the First Amendment is not an absolute. Under certain circumstances, limitations can and must be imposed. Therefore, it becomes the duty of a college administrator at any publicly funded college or university to be able to distinguish between those circumstances where the exercise of First Amendment freedoms may

not be lawfully curtailed and those other circumstances where such a curtailment would not only be consistent with the Constitution, but may also be required by law.

DISTINCTIONS BETWEEN PUBLIC AND PRIVATE INSTITUTIONS

Most of the problems which will be considered within this chapter deal with situations involving publicly funded colleges. Since the Fourteenth Amendment Due Process Clause is a limitation upon *state action* only, and not a limitation upon private actions of purely private persons and institutions, therefore those portions of the Bill of Rights (including the First Amendment) which are incorporated as part of the substantive interpretation of liberty in the Fourteenth Amendment Due Process Clause are binding only upon states and state instrumentalities. Thus, whereas the First Amendment would have a very broad application as a limitation upon the regulatory powers of any publicly funded institution of higher learning, the reverse is generally true with regard to privately funded colleges and universities. As such, a cursory analysis of the Constitution could lead one to believe that private colleges and universities are therefore wholly free to enact any and all regulations, even those which might have the effect of curtailing the free exercise of speech, press, or assembly. However, such a preliminary analysis may not be entirely correct. One of the great paradoxes of our written Constitution is that the specific language set forth therein can often be very misleading. It is not enough merely to *read* the Constitution; you must *understand* what it is you read.

Therefore, although a literal interpretation of the Fourteenth Amendment could lead to the preliminary conclusion that it is not at all binding upon *private* institutions of higher learning, such a conclusion would not be entirely correct. In recent years, there has been an expanding interpretation of the Fourteenth Amendment "state action," especially within the context of higher education. Very few colleges today are wholly and entirely private. In fact, most so-called "private colleges" actually receive large amounts of public funding as well as other state-granted benefits. Furthermore, First Amendment guarantees, being preferred freedoms, can also be held applicable to a purely "private" college when the institution's facilities are readily available to the general public or where the college performs a so-called "quasi-public" function. Therefore, although most of the problems raised by this chapter specifically deal with so-called "public" colleges and universities, nevertheless, administrators should be aware that the principles set forth may have equal applicability to so-called "private" colleges and universities as well.

FREEDOM OF THE PRESS

The First Amendment guarantee of "freedom of press" is generally applicable to publicly funded colleges and universities. Nevertheless, many problems concerning freedom of press and college publications still remain unresolved. An astute college administrator would be wise to periodically consult his school's legal counsel so as to keep abreast of possible changes which are likely to occur in this area.

Since the freedoms of speech and press are fundamental rights guaranteed by the First Amendment to the United States Constitution, they may not be abridged except for the most compelling of state justifications. Therefore, any type of censorship or predistribution restraints will be subject to the highest degree of judicial scrutiny.

Blackstone, in his *Commentaries,* stated in 1876 that the liberty of the press is indeed essential to the nature of a free state, and that this freedom consists of laying *no previous restraints* upon publication. In other words, according to Blackstone, every free man has the undoubted right to lay whatever sentiments he pleases before the public, and to forbid the exercise of this right is in effect to destroy his freedom of press. However, Blackstone's absolutist view does not represent the prevailing interpretation of the First Amendment today. On occasion, colleges and universities, as well as other public institutions, have successfully invoked certain limited prepublication or predistribution restraints upon the otherwise absolute freedom of press.

Certainly, our system of government requires that all persons accept responsibility for their actions. Both student editors and college administrators must therefore share responsibility for the content of official college publications. Therefore, it becomes the obligation of both student editors and college administrators to ensure that these particular publications, published with state funds and under direct authority therefrom, do not contain libelous, obscene, seditious, or otherwise unlawful material. The failure to exercise reasonable restraints upon the distribution of official campus publications can conceivably subject college administrators to legal liability.

The courts are prone to distinguish between *official* campus publications and *unofficial* campus publications when delimiting the permissible scope of administrative regulations. For example, official *student* publications are normally subsidized by public funds (or student activity fees), and they are usually granted a special franchise from the school to maintain their office facilities on college property. Sometimes the publications are specifically created under an express grant of legislative authority. Furthermore, the student editors are often selected by joint student-faculty-administration committees, and upon selection are granted special tuition waivers by the school.

In other words, there is a significant amount of school involvement with an "official" student publication. If a college actually *sponsors* a student publication, or if it grants the publication *special benefits* not obtainable by other publications, or if the school acknowledges *the publication* as its "official campus newspaper," then clearly there is a degree of substantial state involvement. As such, the publication in question would no doubt be deemed by the courts for First Amendment purposes as an "official" student publication.

On the other hand, all *other student publications* would probably be categorized as "unofficial" student publications. Even though they may be otherwise *sanctioned by the school* for campus distribution, and even though they may be published and disseminated by officially sanctioned student organizations, nevertheless, in the absence of *significant* school involvement such publications are still "unofficial."

The determinative factor is not the mere *authority* to publish but rather the degree of school *participation* in the act of publication itself.

In this latter regard the permissible limitation upon the First Amendment freedom of press is far greater for "official" student publications than for "unofficial" student publications, or for general publications not within the confines of the campus community. Private community newspapers have a virtually unhindered First Amendment right to publish whatever they so desire, although they may, of course, suffer legal and criminal consequences thereupon. However, in contradistinction, an instrumentality of the state has an obligation to uphold the law, not merely to break the law and suffer the consequences thereupon. Furthermore, just as the publisher of a private newspaper has the unfettered right to censor his own publication prior to its distribution so as to preclude the inclusion of material which could expose him to liability, so too does the publisher of a college newspaper —the college itself—also have the right to exercise *reasonable* prepublication restraints in order to preclude the imposition of criminal or civil liability.

However, although a publisher of a private newspaper has a virtually unlimited right to censor the contents of his own publication, the prerogative of college administrators to exercise the same degree of prior restraint is severely limited by the First Amendment. Generally, the college can only censor matters which are clearly unlawful and which are not protected by the First Amendment. Merely because a college official finds a column or an article annoying or inconvenient is an insufficient justification for the abridgement of First Amendment rights.

There is a strong constitutional presumption in favor of a student's freedom of press. Therefore, to constitute a valid interference with a student's right to distribute a publication on campus, or to constitute a valid prior restraint on the distribution of an official campus publication, there must be a reasonable probability of either:

1. Material and substantial interference with a legitimate school activity;
2. A strong showing of a present intention to incite or disrupt campus activities, coupled with a clear and present danger that the activities of the school will in fact be materially disrupted;
3. Inclusion of matters in an official campus publication which could expose administrators to common law suits for libel;
4. Inclusion of matters which are "obscene" in accordance with prevailing judicial interpretation.

These are at best limited exceptions to the general rule concerning the presumption of constitutionality. As such, college administrators would be wise to exercise the utmost discretion prior to exercising any unnecessary censorship.

OBSCENITY AND PORNOGRAPHY

In recent years, the Supreme Court has addressed itself to numerous decisions concerning the question of pornography and obscenity. However,

the more often the court attempts to clarify the issue, the more confusing the issue tends to become.

Naturally, college administrators have a vested interest in maintaining standards of decency within the context of their official publications. Therefore, conflicts have often arisen between college administrators and student editors concerning the method and mode of expression in official campus publications. This continues to be a significant problem area for colleges and universities today. Essentially, the problem is whether the university can adopt a more restrictive prohibition against the use of "pornography" or "obscenity" in official college publications than the standard which is imposed by the state on the community at large. Or stated differently, can college administrators enact rules and regulations which prohibit certain specific modes of expression which may offend the sensibilities of others, even where those specific modes of expression may not be so severe as to be violative of state anti-obscenity laws?

Just what is the extent of university control over the contents of official campus publications? To what degree can the university infringe upon the constitutionally protected rights of its student editors? To what degree can the university suppress content in the name of "conventions of decency?" Unfortunately, there is very little definitive case law within this sensitive area. *Even though state funds are technically used to subsidize an official student newspaper, school officials may not necessarily censor all its contents.* In the words of one court, "the state is not necessarily the unfettered master of all it creates." And yet, since the official campus publication is an instrumentality of the state, the college can in effect exercise a large degree of discretion as to the substantive content of the publication.

In conclusion, a college can clearly prohibit judicially recognized and statutorily prohibited forms of obscenity or pornography in its official publications. In addition, the institution can apparently also exercise a wide amount of discretion when establishing "standards of decency" for the substantive content of its student publication. However, if such standards become arbitrary, capricious, or overly restrictive, they may be stricken down as an infringement of the First Amendment freedom of press or as a violation of Fourteenth Amendment Substantive Due Process. Although the First Amendment will generally allow a state to exercise a *wide degree of discretion* in the selection of an appropriate mode of expression within its *own* publications, nevertheless *the limits of discretion are not absolute.* Although a *private* publisher can completely control the method and means of expression within its private publication, an instrumentality of the *state* cannot exercise the same degree of control. It is limited by the First Amendment. Therefore, rules and regulations which are overly burdensome upon the exercise of a student's First Amendment freedom of press, even with regard to official campus publications, is subject to being unconstitutional. On the other hand, it seems equally clear that the college or university can set certain minimum standards of decency for the substantive content of its student publications. With regard to its own official campus publications, the school need not be limited to the lowest common denominator of lawfully permissible expression upon its student editors than the anti-obscenity laws would impose upon editors in the community at large.

Note that a definition of obscenity will be set forth in a subsequent section of this chapter.

PUBLIC OFFICIALS

Many state supported schools have established rules and regulations (or are subject to analogous rules and regulations established by state boards of regents) which prohibit "criticism" of either the governor, state legislators, or even the regents themselves.

Elected public officials do not readily embrace criticism from an official instrumentality of the state, even a campus newspaper. Furthermore, since publicly funded colleges and universities are dependent upon yearly appropriations from these same public officials, administrators are naturally quite sensitive to arousing their enmity.

However, it seems clear that the aforementioned prohibitions are probably unconstitutional. In a leading case on this subject, *Dickey v. Alabama State Board of Education,* 273 F.Supp. 613 (1967), a federal district court invalidated a rule which precluded editorial criticism of the governor or state legislature in official campus publications. The court emphasized that state school officials cannot infringe upon their students' rights of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such rights does not "materially and substantially interfere with requirements of appropriate discipline in the operation of the school."

This rule would seem to apply with equal veracity to rules against criticism of university officials. Although the university can surely prohibit libelous, scandalous, or impertinent matters from within the scope of their official campus publications, a ban on criticism of public officials would strike at the heart of the First Amendment freedom of press and would no doubt be prohibited.

The endorsement of candidates for political office raises an analogous problem to that which was raised in the preceding section. State offícals are naturally quite concerned with the use of public funds and publicly controlled instrumentalities for purposes of partisan politics. In addition, school officials are also concerned with the political effects of their official campus publications. Most publicly funded colleges and universities would prefer to retain an officially neutral posture with regard to elections for any and all state officials. Obviously, this "neutral posture" is designed to preclude unnecessary antagonisms which could hinder the funding for development of necessary educational programs.

However, "political expediency" is an insufficient basis to warrant a complete prohibition against political activity by official campus publications. Generally speaking, an abridgment of the First Amendment freedom of press can only be sustained upon a showing of a "compelling state interest." This is a heavy burden to bear. Merely because a college newspaper's endorsement of candidates for political office may cause inconvenience or embarrassment to the college or its administration is an insufficient basis to justify the abridgment of freedom of press.

This rule would, of course, also apply to a student newspaper's endorsement of candidates for campus or student elections. In this situation,

there is even a less compelling state interest to justify a rule which would preclude student editors from making such endorsements.

PUBLISHING A LIBEL

Although the First Amendment guarantees freedom of speech and press, this freedom is not absolute. We still can be held liable for what we say, and we still can be held liable for what we write.

The common law action for libel is one of the twin torts for defamation of character. Simply stated, slander is the common law action for an oral defamation, and libel is the corresponding action for a written statement which falsely defames the character of another.

Under most circumstances, three elements must be present to constitute the common law tort of libel; (1) the publication of a false statement concerning another; (2) which statement brings hatred, disgrace, ridicule, or contempt upon the person falsely defamed; and (3) damages resulting from the statement. Furthermore, some statements are so-called "libelous per se." The communication of these particular statements may give rise to personal liability without the "injured party" being required to prove actual monetary damages.

Although there is common law variation from state to state, nevertheless, most states recognize the following statements as libelous per se: wrongful accusations that a person has committed a crime, or has been afflicted with a loathsome disease, or is a prostitute. Even statements which falsely degrade another's business or trade may be deemed libelous per se. As such, punitive damages may also be awarded without the necessity of showing actual harm.

Generally speaking, in the absence of some special immunity, colleges and certain appropriate college officials can be held liable for defamatory statements promulgated by their official college publications. As stated previously, this potential exposure to personal liability is an adequate justification to warrant some limited degree of prepublication or predistribution censorship. In addition, college officials in some states may also be able to avoid personal liability by means of an official immunity from tortious suits. The most common of these immunities would be the "sovereign immunity." This doctrine is evolved from medieval English concepts that "the King can do no wrong." Consequently, many states hold that their governmental entities and "public officials" cannot be held liable for their tortious acts where such acts are committed in the normal course of government employment. Many states extend this immunity to school districts as well as other local political subdivisions of the state. Another possible source of immunity is the "charitable immunity" whereby it is held that nonprofit charitable institutions are likewise exempt from liability for tortious acts. However, under either situation individual state laws must be closely examined. In many states the doctrine of charitable immunity no longer exists. In other states there has also been a perceptible trend toward the wholesale (or limited) abrogation of the doctrine of sovereign immunity. Furthermore, in either situation personal liability can still sometimes be imposed if there is a requisite showing either malice or recklessness on the part of the university official. In addition, specifically with regard to sovereign immunity, there is also a divergence of judicial

precedent as to which university officials (or school officials generally) actually constitute "public officials" within the meaning of the rule. In some jurisdictions the immunity in question is limited solely to members of the board of trustees who are actually appointed by the governor or are elected public officials, whereas in other jurisdictions the immunity might also extend to college administrators themselves. Clearly, in many jurisdictions even where doctrine of sovereign immunity is applicable, it might not be actually available to either board members or college administrators. College officials are, therefore, advised to verify the law within their own jurisdiction to ascertain both the limits of liability and the extent of any immunity arising from an inadvertent or willful communication of a defamatory falsehood in an official college publication. Both the college itself and certain specific college administrators may conceivably subject themselves to liability for defamatory falsehoods promulgated in official campus publications. Reasonable preventive measures should be adopted to preclude the distribution of this unlawful, injurious, and offensive material. Failure to take appropriate action may in itself be an indication of recklessness on the part of the college or its individual administrators. Such inaction compounds the possible exposure to liability.

However, it should be noted again that the only permissible preventive measures which can be adopted in this regard are those which are both *appropriate* and *reasonable* under the circumstances. The potential risk of exposure of an educational institution or its administrators to civil liability for libel is not in itself a sufficiently compelling statement to justify the complete abrogation of the First Amendment freedom of press. In addition, the college cannot prohibit any and all articles which may be critical of others, or which are controversial, or which could expose the school to undesirable publicity. The school may only adopt reasonable precautions against the promulgation of false and defamatory statements, but not those statements which are merely *critical* of others.

Admittedly, phrases like "appropriate and reasonable" are somewhat vague and indefinite; they offer little definitive guidance. However, it is very difficult to draw the line between permissible criticism and prohibited libel. For example, can administrators validly restrain a student editor from printing an article in an official campus publication which condemns a faculty member's teaching techniques as "crazy?" Is that libelous per se or merely lawful criticism? Frankly, there is no easy answer. Since this is a very sensitive area, subject to many differing variables, administrators would be wise to rely heavily upon the advice of legal counsel.

For further information concerning the subject of defamation, see this chapter Section III-E: LIBEL AND SLANDER, and subsequent chapters on: "legal liability of faculty" and "legal liability of trustees and administrators."

STUDENT'S RIGHT TO DEMAND PUBLICATION

Since campus publications are often deemed to be the official organs for a student's literary or journalistic endeavors, and since these publications are supported by public funds and student activities, it has occasionally been argued that a student has a qualified right to demand publication of an article in a campus newspaper. Usually this issue arises in response to a

controversial editorial policy adopted by the student editors of the campus newspaper itself. Inevitably, when this set of circumstances does occur, it places college administrators in an awkward constitutional dilemma. If the students' newspaper is in fact the *students'* newspaper (or even if it is merely the *college's* newspaper) can the school deny a student the right to demand publication of an article in *his* or *her* campus publication? Or can a student validly assert that he or she has been denied his First Amendment freedom of press when denied free access to the campus press itself?

Actually, the answer to this question is as paradoxical as the question itself. A student does not have the constitutional right to commandeer the press and columns of an official campus newspaper for the publication of an article. However, at the same time, campus officials (and for that matter, student editors) cannot summarily reject articles submitted by other students merely because they are deemed "controversial" or "inappropriate" for publication. For example, although a student would not have a constitutional right to demand publication of an article on "Communism in America" in a campus literary journal, a university rule which prohibited the publication of any article on "Communism in America" would just as clearly be unconstitutional.

Since student newspapers are often granted a virtual journalistic monopoly on college campuses, it would thus be constitutionally inappropriate to manage these papers in a way which categorically prevents the dissemination of certain ideas on campus. This clearly is an abridgment of freedom of the press. However, at the same time, so long as university administrators make reasonable efforts to insure the inclusion of diverse, contrasting, or even unpopular viewpoints, and so long as there is no university rule or regulation (or any editorial policy) which allows for the inclusion of some particular modes of thought while at the same time allowing for the exclusion of some other particular modes of thought, then no student should be able to claim that his First Amendment rights were violated.

Interestingly, in this latter regard, the constitutional standard which is applied to community newspapers is somewhat distinguishable from the standard which is applied to official campus publications, such as student newspapers. Even though both community newspapers and campus newspapers have the right to reject articles submitted by readers, as contrasted with private publications which have the right to pursue almost any editorial policy, even to the absolute exclusion of all other different points of view, an official campus publication would seem to have far less discretion. Colleges must take appropriate steps to insure a fair and impartial presentation of ideas. Whereas the First Amendment guarantees that a private community newspaper need only represent the viewpoint of its publisher, that same amendment would also seem to impose a contrary obligation upon official campus publications. At the very least, college administrators must take appropriate measures to insure that official publications, especially student newspapers, at least afford the *opportunity* for the dissemination of varying student viewpoints. If there is an available means for the dissemination of ideas, then there will be no violation of the First Amendment. However, if the available means can only be utilized for the dissemination of *some* ideas (to the exclusion of others) then freedom of press will most likely have been abridged.

RESPONSE TO CONTROVERSIAL MATERIAL

It is worth noting, if only in passing, some of the various responses which have been manifested in recent years to controversial articles or editorial policies. These varying responses have included confiscation of publications by college officials, expulsion of student editors, and withdrawal of necessary funding. Needless to say, the general validity of these individual responses will depend largely upon the underlying legality of the offending actions themselves. In other words, a publicly funded college may not expel a student editor from school for publishing a constitutionally protected idea in an official campus publication. Furthermore, although there is no constitutional right to an official student newspaper at a publicly funded college or university, the complete withdrawal of funding of a paper already established, as a retaliatory action against controversial editorial policies of student editors, may in itself also constitute an abridgment of the First Amendment freedom of press. Although a student body cannot demand that its college or university fund an official campus newspaper, if such a publication is already being maintained, college officials cannot threaten to withdraw funding as a means of subjectively coercing student editors not to publish certain specific editorials, opinions, or ideas, so long as they are otherwise protected under the First Amendment of the Constitution.

In recent years there have also been certain incidents involving individual students who have refused to pay mandatory activity fees as a form of "political protest" against the editorial policies being pursued by student editors of official campus publications, especially where the publications are partially funded by the activity fees in question. Is this form of "civil disobedience" a protected mode of political expression under the First Amendment of the United States Constitution? To make a long story short, the answer is "no."

In recent years, many courts have struggled with the problem of confidentiality of a newspaperman's sources of information. More and more reporters have been asserting this "privilege" in a variety of legal proceedings.

The question for college administrators is whether or not a student editor of an official campus publication can be disciplined for refusing to reveal the sources of his news stories to either governmental investigatory agencies (such as narcotic investigators) or to college administrators themselves when conducting related disciplinary proceedings.

This presents a new and controversial First Amendment problem. Most states which have considered the issue have held that the public's need to know outweighs the newsman's need to protect the sources of his information. However, in direct response to these judicial decisions, several states are contemplating (or have already enacted) legislation which would cloak a newsman with a privilege against the forced disclosure of his sources of information. Unfortunately, at this point there is no way of determining whether or not the particular statutes in question would have any applicability to newsmen or editors gathering sources of information for publicly funded student publications. In all likelihood, the answer will be no. This legislation will probably deal only with newsmen gathering sources for *private* as opposed to *public* newspapers and magazines. So,

even if such a statute has been adopted in your state, it is unlikely that the law has consequently engendered any privilege for student editors not to disclose sources of their information to university authorities in the course of normal disciplinary proceedings. In this regard, student editors must assume the same responsibility as all other students within the campus community. Or as it is engraved on the tombstone of Mrs. Lester Moore, in Tombstone, Arizona, "No less, no more."

UNOFFICIAL CAMPUS PUBLICATIONS

In contradistinction to the preceding section of this chapter which dealt with so-called "official" campus publications, those which are published with a significant degree of college participation, this particular section will deal with problems faced by college administrators with "non-official" campus publications, regardless of mode of dissemination.

Unless the publication in question manifests the likelihood of a "material and substantial" disruption of college activities, or unless the publication contains libelous or obscene material, college administrators generally cannot prohibit the distribution of the "underground press" on campus. This is also true with regard to all other non-offensive off-campus publications. Furthermore, students cannot be barred from *selling* the literature in question on college property, unless there is evidence that the act of selling itself will constitute a substantial disruption of school activities. Therefore, in light of the above rules, it should be obvious that school officials cannot ban a publication merely because it advocates unpopular ideas, or because it would be controversial, or because it is "inappropriate," or because it might offend the sensibilities of some members of the campus community or least of all because the publications in question criticize campus administrators or publicly elected officials within the state.

In a recent United States Supreme Court decision, *Papish v. University of Missouri,* 410 U.S. 667 (1973), the Court was faced with the problem of obscenity and pornography contained in an "underground" newspaper distributed on campus. On the front cover of the newspaper in question was a reproduction of a political cartoon, previously printed in another newspaper, depicting a policeman raping a Statute of Liberty and the Goddess of Justice, and a caption under the cartoon reading: "With Liberty and Justice for All." Inside the newspaper was reprinted another article which discussed the trial and acquittal of the leader of an organization called "Up Against the Wall, Motherfucker."

As a direct result of her distribution of the newspaper on campus, a graduate student in journalism was charged by college administrators with a violation of a university by-law prohibiting "indecent conduct or speech." Thereupon the student was expelled from school.

Subsequently, she instituted a suit for declaratory and injunctive relief in her local United States District Court, and thereafter began to appeal her way up to the United States Supreme Court. In a brief opinion the majority of the Supreme Court held that the university regulation in question was not immune from the First Amendment, and that neither the political cartoon nor the controversial article could be labeled constitutionally obscene. The Court took the position that the First Amendment "leaves

no room for the operation of a dual standard in the academic community with respect to the content of speech." The university could not regulate speech content using a separate standard based upon "conventions of decency." Although the university might reasonably control the *time, place,* and *manner* of speech and its dissemination, the "mere dissemination of ideas—no matter how offensive to good taste" does not constitute that type of conduct which could be legitimately regulated by the university.

In effect, the Court stated that the standard to be applied by university officials when establishing anti-obscenity regulations must essentially be the same standard which is applied to the community at large. In that latter regard, the case of *Miller v. California,* 413 U.S. 15 (1973) now sets forth the determinative test as to when materials may be regulated by the state as obscene. Works which may be proscribed under the *Miller* standard are those which depict or describe sexual conduct that is specifically prohibited by state law, and which taken as a whole appeal to a prurient interest in sex, portray sexul conduct in a patently offensive way, and have no serious literary, artistic, political, or scientific value. The works are to be judged under local community standards as applied by the average person.

Not unexpectedly, some administrators might be in a quandary as to the application of the above-stated general obscenity rule, specifically with regard to the evaluation of "community standards." Does this mean that subject matter may only be prohibited on campus as "obscene" if the average student *on campus* finds the material offensive? Is the campus the "community standard" which is to be applied?

If the application of the so-called "community standards test" is to be based upon standards as applied by an average student on the university campus, then at certain schools it is quite conceivable that college administrators could promulgate *no* lawful anti-obscenity regulations at all. However, this does not appear to be the case. The contemporary community standards which are to be applied would probably be derived from either state or county norms. If a particular publication, taken as a whole, is constitutionally violative of a state anti-obscenity statute, then it would, of course, be ludicrous to assert that college administrators could not discipline their students for the dissemination of such publications on campus, even though the publications in question might not actually be offensive to a typical student enrolled at the college or university. In other words, although a college may not adopt a *more* restrictive regulation than that which would be constitutionally allowed within the general community, at the same time the school is certainly not compelled to adopt rules and regulations which are any *less* restrictive than those which may be lawfully enforced within the general community at large. Simply stated, "no double standard is to be applied."

A publicly funded college can only exercise a very limited degree of control over the *content* of non-official campus or off-campus publications which are disseminated on college property. However, within certain definite parameters the school may still validly enact regulations concerning the *method* and *mode* of distribution. Basically, the college can legitimately exercise its authority to enforce reasonable regulations as to time, place, and manner of dissemination. Here again, the key element is

"reasonableness." If the regulation in question is unreasonably prohibitive, if it is overly burdensome, or if it simply has the effect of precluding the dissemination of constitutionally protected ideas altogether, then the regulation in question is surely a violation of the First Amendment. Literature may only be barred from school property if its distribution "materially and substantially" interferes with school activities. The mere presence of *some* disruption in the handing out of literature is insufficient to justify its complete prohibition. Minor disturbances or minor disruptions are not justification for prohibiting students from expressing their views.

If the college does adopt a rule concerning the distribution of literature on campus, the rule must not be so restrictive as to exclude the period when most students in the desired audience would be present and available for communication. After all, the First Amendment includes the right to receive as well as to disseminate information.

As a general rule, colleges can enact rules and regulations which prohibit the distribution of leaflets *in the classroom* while class is in session and probably just before class is to begin, since this activity would likely disrupt or interfere with normal educational activities. However, students should be afforded a reasonable degree of latitude when distributing similar leaflets or pamphlets after class is over or on non-academic areas of the campus.

Sometimes problems occur with regard to the setting up of literature tables in main breezeways or in hallways of academic buildings. A general blanket prohibition against the distribution of *any* materials in these highly congested areas would probably be upheld, so long as the school provides some reasonable alternative location whereby the desired dissemination of material can be promulgated by the interested students. Furthermore, university authorities cannot "limit the congestion" in hallways, lobbies, or breezeways by enacting limited bans against the dissemination of leaflets or pamphlets predicated upon the relative contents of the material being disseminated. In other words, a school cannot validly prohibit the distribution of "political" or "non-objectionable" information.

Needless to say, all of the above-stated principles apply with equal veracity to the distribution and sale of ordinary non-offensive off-campus publications on college-owned property. A complete prohibition against the sale of *all* publications on campus is probably just as violative of the First Amendment as a selective prohibition predicated upon content of the paper in question. Lastly, it must again be noted that the time and place of sale must not be unreasonably restricted. First Amendment protections apply equally to ideas which are *sold* as to ideas which are disseminated free.

FREEDOM OF SPEECH AND ASSEMBLY

The concept of *speech*, as in "freedom of speech," may be categorized as either "pure speech" or "symbolic speech." Although the latter principle is actually more akin to *conduct* than *speech*, both forms of expression may be protected under the First Amendment. To be sure, even *silence* could be a protected form of speech.

The case of *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), clearly sets forth the general rule that a student's right to symbolic expression on public school property is a *fundamental right* under the First Amendment which cannot be curtailed in the absence of a showing that the specific acts of expression "materially and substantially disrupted the work and discipline of the school."

The *Tinker* decision involved students who were forbidden by high school officials to wear black arm bands to protest the war in Vietnam. Other cases involving constitutionally protected symbolic speech have involved protest sit-ins, "desecration" of the national emblem, use of "obscenities," and the display of controversial theme-oriented art exhibits. In each of these situations, the act in question merely constituted an alternative mode of expression of otherwise constitutionally protected ideas.

However, not all acts can be construed as constitutionally protected "symbolic speech." For example, acts of violence, indecent exposure, or the repeated use of profanities need not be condoned by college administrators under the guise of "protected speech."

The courts also make a distinction between cause-oriented or politically-motivated "public speech," which *is* protected as a fundamental right under the First Amendment, and commercially-oriented business promotion which is not subject to the same degree of constitutional protection. For example, if J.J. Smith is running for senator, he has the fundamental right (subject to certain limitations) to advertise his candidacy on the premises of a state-supported college. But he does not have the right to distribute leaflets advertising "bargain basement prices" on the sale of new appliances at his downtown department store, regardless of the fact that the profits from the sale of the new appliances may be used for purposes of financing his senatorial campaign. Sometimes, it is very difficult to draw the line between protected "public" and unprotected "commercial" speech. The mere fact that something is being sold, or that an admission charge is being imposed, or that money is being raised, does not necessarily mean that the activity in question is purely commercial and, therefore, unprotected by the First Amendment. Certainly, raising necessary funds to help advocate a cause is a necessary attribute of political advocacy itself. Therefore, in cases of doubt, the courts will generally tilt toward freedom of expression.

It should also be noted at the outset that the concepts of "freedom of speech" and "freedom of assembly" are largely indistinguishable principles of law. *Freedom of speech* in itself is meaningless unless there is someone to whom the speaker can communicate his ideas. In other words, freedom of speech is meaningless without freedom of assembly. Conversely, *freedom of assembly* is also in itself meaningless unless the persons assembled retain the correlative right to speak to one another—to communicate their ideas. Freedom of assembly is meaningless without freedom of speech.

Therefore, because of the inseparable inter-relationship between these two correlative principles of law, all problems concerning the First Amendment freedom of speech and the First Amendment freedom of assembly will be considered on a joint and mutual basis within this chapter.

STUDENTS AND STUDENTS' RIGHTS

Participation in the political process forms the very basis for our constitutional democracy. The right of persons in our society to promote the candidacy of elective officials and to publicly espouse the advocacy of political causes are stringently protected freedoms guaranteed by the First Amendment.

Generally speaking, most state statutes, as well as rules and regulations promulgated by state-supported educational institutions, will be upheld as legitimate exercises of governmental power if there is a mere "rational basis" to justify the law. However, laws which have the effect of infringing upon First Amendment guarantees will be held to a far more restrictive standard. The First Amendment freedoms of speech and association are considered "fundamental rights" within our Constitution. They cannot be abridged unless there is a "compelling state interest."

Needless to say, persons do not lose their constitutional right (nor can they shed their constitutional obligation) to participate in the political process by enrolling as students in a state-supported college or university. At the same time, however, there is also a very strong argument for *limiting* the use of college facilities for the advancement of a particular political cause. This limitation argument is founded upon the premise that the public instrumentalities of a state should strive to maintain a neutral posture with regard to partisan political issues. Furthermore, schools which are publicly funded are also desirous of maintaining a neutral political posture, if only to preclude any unnecessary alienation on the part of elected public officials responsible for the determination of the college's yearly financial resources. Since educational funding is a yearly hot potato in many state legislatures, (and other funding bodies) many college administrators by necessity try to adopt reasonable precautionary measures to preclude unnecessary (and largely irrelevant) criticism. Ironically, the reality of educational politics often dictates that a state-supported educational institution must adopt a neutral and noncommittal attitude toward contemporary political issues, if only to guarantee its own continued existence within the context of the political system.

In this regard, there are several applicable "do's" and "don'ts." First of all, no state-supported educational institution can adopt a regulation which prohibits students from participating in *all* conventional political activities. Any such complete ban on electioneering is clearly and obviously a violation of the First Amendment freedoms of speech and assembly. A school is also prohibited from adopting regulations allowing *some* political interests to campaign on campus, while at the same time excluding other less conventional or more contumacious political interests from also disseminating their ideas. Finally, a publicly-supported school is also prohibited from adopting regulations which purportedly allow *all* competing political interests to actively campaign on campus, while at the same time overly restricting the ability of any of the aforementioned interests to freely disseminate their ideas. For example, a regulation which permits or even encourages the widespread participation of divergent political actions in a joint rally, with the opportunity to share equal time in the advocacy of their ideas and in the dissemination of their literature to

interested students, may unfortunately still be UNCONSTITUTIONAL—if the particular college regulation also mandates that conventional electioneering on campus *must* be limited to the above-stated campus rally. Although this particular regulation may seem to be fair and neutral on its face, the application of the regulation is overly burdensome upon the free exercise of First Amendment rights.

The same result would probably accrue upon the application of a similar regulation concerned with campaign activities connected with directly regulated campus or student elections. Although there is no constitutional right for students to organize an official *student* government, if such a government is in fact formed, and if it is recognized by the college as an official campus organization, then the First Amendment would guarantee the free exercise of all reasonable political activity in connection thereto.

Examine this problem from another perspective. The First Amendment freedom of assembly guarantees students (as well as all other persons) the right to organize into voluntary political associations. Therefore, if enough students really so desire, they could freely organize themselves into an *unofficial* "student government," or a "student persons' student government," or whatever. Thereupon, the newly created organization would be entitled to the usual constitutional protections against overly burdensome college regulations. In other words, the First Amendment freedom of assembly would guarantee the organization a reasonable degree of latitude to attract new members on campus and to conduct its other organizational activities, including elections. Therefore, since the First Amendment forbids college administrators from unduly abridging the prerogative of an *unofficial* student government to conduct campaign activities on campus, it reasonably follows that the state-sponsored *official* student government should also be entitled to the same constitutional rights.

Certainly, the fact that these regulations may be counterproductive only adds impetus to the constitutional argument against imposing a set of regulations upon campaign activities associated with *official* student government elections that is more restrictive than those which are similarly imposed upon the campaign activities of off-campus political groups, or upon campus organizations purporting to be "unofficial" student governments.

However, even in light of the above, it should again be remembered that the First Amendment freedom of speech and assembly is not an absolute right. Neither regularly enrolled students nor other unenrolled persons have an absolute unfettered constitutional right to effectuate political activities on campus. College administrators can, consistent with the First Amendment, enact reasonable nondiscriminatory regulations concerning the *time*, *manner*, and *location* of conventional electioneering on campus—so long as the regulations in question still provide some effective means for the communication of political ideas to interested students on campus.

For example, colleges can generally prohibit (or severely limit) conventional political activities in *academic areas* on campus, especially when classes are actually in progress. Furthermore, the school can also restrict these activities from or to specified *non-academic areas*, so long as the re-

strictions are not so prohibitive as to prevent the desired communication of ideas to the intended audience.

In addition, the school can also restrict the *manner* and *means* of communication. Although an information table in a student union breezeway is almost always permissible, it doesn't necessarily follow that an organization can set up an unlimited number of these tables. Nor is there any constitutional right to the unrestricted use of sound amplification equipment for purposes of "effective" communication. Although students may have the right to disseminate their ideas, they have no right to compel others to listen.

Additional guidelines regarding restrictions upon political expression within the context of the campus community will be set forth in the following section dealing with student demonstrations.

STUDENT DEMONSTRATIONS

Although publicly funded colleges generally may not infringe upon a student's First Amendment freedoms of political expression, unless there is a compelling state interest, the courts have long recognized that student demonstrators do not have a constitutional right to protest whenever, however, and wherever they please. Any campus demonstration which materially disrupts classwork, or which involves substantial disorder, or which constitutes an invasion upon the rights of others, will not be constitutionally permissible. A student's participation in such a demonstration is sufficient grounds for appropriate disciplinary action, including expulsion from school. Furthermore, a college need not wait until *after* an impermissible disturbance has occurred before taking appropriate counteractive measures. College administrators have both the right and the obligation to protect their institution's property, and to maintain an educational environment conducive to the varying academic endeavors of the school's regularly enrolled students.

Sanctioning Procedures. Many problems have arisen in recent years concerning sanctioning procedures for student demonstrations. As a result, the courts have had the opportunity to evolve specific judicial guidelines for adherence by contemporary college administrators.

Any college regulation which prohibits "all student demonstrations" without a prior permit from a specified campus official is violative of the First Amendment freedoms of speech and assembly. Such a regulation, although neutral on its face, is guilty of the sin of being "overbroad." In effect, it purports to require prior approval before a student can exercise his constitutional rights. This is what is known as an unconstitutional "prior restraint."

However, if the above-stated rule was coupled with a clearly defined prohibition against student assemblies not maintaining acceptable standards of responsible conduct, then the regulations would be constitutionally valid. For example, a school could validly establish a prohibition against student assemblies obstructing the ingress or egress of persons through college buildings or facilities. Thereafter, the school could conjunctively refuse to grant an assembly permit to any organization which does not adopt reasonable precatuionary safeguards to insure compliance with the aforementioned regulation. So long as the purpose of the regula-

tion is unrelated to the suppression of freedom of speech or assembly then the regulation will be deemed valid. Its penalty provisions could be invoked to discipline leaders of disruptive student demonstrations. In fact, given the above-stated set of circumstances, the appropriate student leaders could conceivably be disciplined for both their participation in the disruptive assemply, as well as the failure to obtain necessary prior approval.

A more complicated problem is raised when college administrators seek to impose disciplinary measures upon student leaders who violate a properly defined sanctioning regulation by not obtaining the necessary prior approval, and who then participate in a "constitutionally protected" nondisruptive political demonstration. In other words, can students be punished for ignoring sanctioning procedures, or for participating in "spontaneous" student demonstrations, if the demonstrations in question are protected modes of expression under the First Amendment? Unfortunately, judicial decisions are divided. Some courts have taken the position that *any* prior restraint upon freedom of speech or assembly is an impermissible burden upon First Amendment rights. Other courts have taken the position that *some* prior restraint may be imposed if the regulation in question purports in a well-defined manner to prohibit assembly manifesting irresponsible or unacceptable standards of conduct. So long as the regulation cannot be manipulated so as to *prohibit* a constitutionally protected demonstration, then the penalty provisions of the permit regulation can be validly enforced against noncomplying organizers of otherwise permissible student assemblies. This is clearly the better view.

Our constitutional system implies both individual *rights* and individual *responsibilities*. The effectiveness of college sanctioning procedures as a bona fide limitation upon the conduct of impermissible student demonstrations will largely be undermined if the applicability of such regulation is dependent upon an *after-the-fact* determination as to the constitutionality of the consequent demonstration. Just as the permits themselves must be *issued* in a nondiscriminatory manner, a manner which does not prohibit the assembly of students for any constitutionally protected purpose, so too must the *enforcement* of the penalty provision of these regulations also be maintained in an equally neutral and nondiscriminatory manner, a manner which imposes the responsibility for compliance equally upon all students within the campus community.

A correlative problem deals with the application of the "overbreadth" doctrine to college anti-disturbance regulations, where the standards of compliance are delineated in a vague and indefinite manner. The problem with these regulations is that they fail to narrowly set forth the specific forms of conduct which are prohibited, and, therefore, may be applied with a great deal of discretion. Unless specific criteria are set forth, the individual charged with the responsibility for issuing or for refusing to issue the requisite authorization may base his ultimate rejection upon considerations which are protected under the First Amendment.

In the general community, the application of a validly enacted statute may be set aside as an unconstitutional infringment upon freedom of speech, regardless of the nature of the offending acts themselves, if the statute on its face is so overbroad as to constitute a "chilling effect" upon the free exercise of First Amendment rights. For example, a municipal ordinance prohibiting the distribution of "leaflets from door to door"

would probably be unconstitutional *on its face* because it purports to prevent the distribution of *all* leaflets, even those which might be protected under the First Amendment. In such situations the ordinance would be totally unenforceable, not only against persons distributing "protected" leaflets but also as applied to *any* person distributing any other leaflet as well. In these overbreadth situations, the court does not necessarily look to see whether the *acts in question* violated the First Amendment, but whether the *statute itself* was violative of First Amendment guarantees.

Of course, if the *acts* in question are *protected* by the First Amendment, then there seldom is a major problem; the "accused" goes free. However, in situations where a statute is challenged as being overbroad, where a so-called "facial attack" is successfully maintained upon the content of the *statute itself,* then the accused may *also* go free, regardless of the fact that the offending acts were *outside* the protective pall of the First Amendment.

However, regardless of the applicability of the above-stated principles to statutes regulating conduct within the general community, the Supreme Court has recently indicated that it would not invoke the "overbreadth doctrine" to statutes prohibiting disturbances in publicly funded schools. In *Grayned v. City of Rockford,* 408 U.S. 104 (1972), the Court rejected the facial approach by holding that the validity of a regulation of expression in a school must depend solely upon whether any disturbance of educational activities would result from the manifested conduct in question. In other words, the Court has apparently adopted a double standard with regard to the requisite precision of expression necessary to sustain noncriminal (campus) regulations as opposed to general criminal statutes. As such, the Court has also strengthened the authority of school administrators and state legislators to maintain order on campuses and in classrooms by means of general anti-disturbance regulations which had on occasion been previously held unconstitutional under the "facial application" of the First Amendment overbreadth test.

Permissible and Impermissible Student Demonstrations. As a general rule, the nature, extent, and scope of a student demonstration will be deemed permissible under the First Amendment to the United States Constitution, so long as it does not substantially or materially disrupt normal educational activities. This by necessity involves a balancing of the competing interests between the First Amendment freedom of speech and assembly and the societal need to maintain order and discipline within the context of the academic community. Every set of circumstances is different; and therefore, each case must be considered on a case-by-case basis. The following will set forth for purposes of comparison several examples of student demonstrations which have been judicially construed as impermissible followed by an analogous list of circumstances under which similar demonstrations have been held to be protected by the First Amendment.

The courts have upheld the expulsion or suspension of students for participating in demonstrations where their conduct consisted of the seizure and occupation of a college building or physical blockage of others from obtaining access thereto; the extensive and repeated public display of obscene language punctuated by the shouting of profanities at campus rallies; the participation in demonstrations wherein property is destroyed,

cars blocked, or persons shoved by protesting demonstrators; the forced compulsion of other students to wear freedom buttons and the consequent disruption of normal activities in the schools; and the participation in a disruptive anti-war rally on the field during halftime at a college football game. Interestingly, many courts have adopted a generally dim view toward the effectuation of political protests at campus athletic events, especially where the demonstration in question involves the college band or members of the competing athletic teams. In fact, one local judge simply took the position that "there is a time for football, and a time for protest; but that protest and football do not necessarily mix."

Nonetheless, reasonable nondisruptive modes of political expression have been successfully maintained at campus athletic events, even by the athletes themselves. In addition, the courts have also refused to uphold the expulsion or suspension of students for participating in demonstrations where their conduct consisted only of the participation as a spectator (as opposed to an active participant) in a violent or disruptive campus demonstration; the participation in a non-violent "sing-in" on a college president's lawn during the lunch hours; the wearing of freedom buttons or black armbands in school without substantially interfering with the operation of the school or infringing upon the rights of others; and the mere use of obscenities, not as separately identifiable conduct, but rather as a mode of expression for the communication of otherwise protected political ideas. In this latter regard, the Supreme Court has recognized that profanities may be chosen as a mode of expression as much for their emotive as their cognitive force. The Court has also refused to accept the premise that government can forbid particular *words* (as opposed to particular *conduct*) without also running a substantial risk of suppressing ideas in the process. As the Court stated in the case of *Cohen v. California*, 403 U.S. 15 (1971), "Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for abandoning the expression of unpopular views." Or as stated more recently by a judge on the New Jersey Court of Appeals:

> Statutory attempts to regulate pure bluster; can't pass what is called constitutional muster. Use of vulgar words that may cause resentment; is protected by the First Amendment.
> There must be a danger of breach of the peace; for this near sacred right ever to cease.

Participation in an Off-campus Demonstration as Grounds for Suspension or Expulsion from School. While most of the cases in this area involve students at the secondary school level, the general constitutional principle set forth would also apply with equal veracity when considered within the context of higher education.

As a general rule, a school may punish a student for off-campus conduct *directly affecting* the school's discipline or general welfare. For example, a student can validly be suspended from school for writing, publishing, and distributing immediately outside school property a profane and unlawfully obscene newspaper to other students entering onto university property. On the other hand, a student may not be disciplined for off-

campus conduct involving First Amendment *protected activity,* unless such activity causes a substantial and material interference with the normal operations of the school. In other words, off-campus publication and distribution of "underground" newspapers, or participation in off-campus sit-ins, protest rallies, or political demonstrations cannot normally constitute the basis for on-campus disciplinary action. Usually these activities are too remote to constitute a substantial and material interference with normal on-campus education activities.

STUDENT ORGANIZATIONS

Colleges in recent years have been faced with various problems concerning the role of student organizations on campus. Among the questions which have arisen in this area include the college's right to withhold official sanction of a campus organization, as well as its right to limit or prohibit certain campus activities or deny the use of campus facilities to non-sanctioned or sanctioned organizations.

The leading case in this area is *Healy v. James,* 408 U.S. 169 (1972), a landmark decision concerning the right of association on campus. Specifically, the case involved a college's denial of "official recognition" to a newly organized local chapter of the Students for a Democratic Society. Failure to obtain this official sanction meant, in effect, that the students concerned would not be permitted to place announcements regarding meetings, rallies, or other activities in the student newspaper, or to use the various college bulletin boards, or to use campus facilities for holding meetings.

The denial of the application in question was premised largely upon the school's concern that the newly formed local organization might respond to "issues of violence" in the same disruptive manner as had other S.D.S. chapters throughout the United States.

Ultimately, the matter was decided in favor of the students. The court recorgnized that it is perfectly proper for a college administration to prohibit activitie· by students or by groups of students which infringe upon reasonable campus rules, interrupt classes, or which substantially interfere with the opportunity of other students to obtain an education. Therefore, the court also agreed that it is proper for a college administration to inflict discipline for the violation of reasonable campus rules, in order to protect itself and its property, and to require that its students adhere to general standards of conduct. Therefore, the school may validly impose a requirement that a group seeking official college recognition affirm in advance its willingness to adhere to reasonable law and to conform with reasonable standards of respectable conduct. Nevertheless, in the absence of a sufficient justification, state supported colleges and universities may not deny official recognition to student groups or deny them use of college facilities. Such a denial abridges the rights of individuals under the First Amendment to freely express themselves and to freely associate with others. The burden is not upon the students to justify their application for recognition, but is rather upon the college administration to justify any decision it might make rejecting such an application. The justification for

nonrecognition may not be based upon a mere disagreement with the philosophy of a group of persons, or even upon the mere expression of views condoning violence and disruption, but may only be based upon a group's unlawful or disruptive activities, or upon its advocacy of views directed to inciting or promoting imminent lawless action and likely to incite or produce such action on or near college owned property. This latter aspect of the court's decision is a reiteration of the famous "clear and present danger" test which is normally the criterion for satisfying the requisite compelling state interests necessary to justify an infringement upon First Amendment freedoms of speech and association.

Apparently, the only constitutionally permissible recourse available to the school was to grant recognition, if the students agreed in advance to comply with university regulations, and then to take appropriate steps if and when its members engaged in or presented a clear and present danger of causing conduct which could be constitutionally forbidden under valid college rules. (To curtail S.D.S. was to employ a forbidden prior restraint upon the free exercise of First Amendment rights.) The college's action cannot be justified upon a mere undifferentiated fear of disorder. Although the school has valid interests to protect, it must employ a less drastic means to secure and protect these interests from violent, disruptive, or otherwise illegal disorders.

Simply stated, a college may adopt reasonable sanctioning procedures for the regulation of student organizations and for the purpose of prescribing and controlling rules of acceptable conduct for organizational activities. As such, the school can lawfully deny the use of its facilities to nonsanctioned student organizations, regardless of the otherwise nondisruptive nature of their activities. However, the school may not deny official recognition to a group of students organizing for any purpose protected under the First Amendment. Furthermore, the school may not deny the right of student organizations, whether sanctioned or nonsanctioned, from participating in "protected" activities on those specific areas of campus property over which students are generally entitled to maintain free access without obtaining any special prior administrative approval. However, at the same time, a school may validly prohibit the activity of *any* student organization, sanctioned or nonsanctioned, or *any* portion of the college's property, if the specific nature of the conduct in question is outside the protective scope of the First Amendment, and is otherwise forbidden under college rules clearly defined and indiscriminately enforced.

The most recent flurry of cases in this area deals with the rights of "Gay Student Unions" to organize on campus, and to freely conduct their activities thereupon. Some schools have attempted to withhold official recognition of these organizations ostensibly on the grounds that they constitute conspiracies to violate state laws proscribing "sodomy" or "unnatural sexual behavior."

To date, these attempts to withhold official recognition of so-called "homosexual activist groups" have been eminently unsuccessful. So long as the group's activities are somehow related to the achievement of social or political change, their right to official recognition is clearly protected by the First Amendment freedom of association. The same would also be true with regard to student groups advocating changes in the drug laws, the vio-

lent overthrow of the United States (Communists), or possibly even a student group which advocated a return to slavery. The test of recognition, as set forth in the *Healy* decision, cannot be premised upon the "offensive" nature of the students' views. So long as the students do not actually break the law, they still have the right to freely advocate changes in the law itself. Furthermore, the students can even *advocate* that *others* break the law (civil disobedience), so long as the advocacy is not directed nor likely to produce *imminent* lawless action. Even though an organization may be unpopular or offensive to others, ideas are protected under the constitution. The fact that officials at a state university may find the expressions of a gay students' organization offensive or abhorrent does not constitute a compelling state interest upon which to predicate the impairment of the organization's First Amendment rights. Although a college or university can maintain a greater degree of latitude to regulate the organization and functions of purely social organizations, such as fraternities or sororities, it may not overly restrict the activities of a cause-oriented group such as a gay student union.

Recently, at the University of New Hampshire an interesting case arose when the school's officially recognized gay student organization (G.S.O.), attempted to sponsor dances on campus. Because of widespread media coverage and criticism by the governor, the university's board of trustees issued a "position statement" temporarily prohibiting the university administration from scheduling any further social functions by the G.S.O.

Subsequently, the students instituted a civil rights action against the trustees and administrators of the school, eventually winning. The United States Court of Appeals, First Circuit, agreed that a publicly funded college or university may act to prevent criminal conduct by policies focused on real and established dangers and may proscribe the advocacy of illegal activities falling short of conduct in itself not criminal, if the advocacy or conduct is directed at producing or is likely to incite imminent lawless action. Nonetheless, the mere speculation that individuals might at some time engage in illegal activity is an insufficient basis to overcome the application of First Amendment rights. If the school acts in a fair and equitable manner, it may validly regulate overt sexual behavior which is short of criminal activity, where the behavior offends the community sense of propriety. However, the mere fact that officials at the state university found the expressions of the G.S.O. offensive or abhorrent is not in itself a sufficiently important governmental interest upon which to predicate an impairment of the organization's First Amendment freedoms.

Precluding gay student organizations from holding social functions on campus at a state supported educational institution cannot be justified on the theory that the state has a substantial interest in preventing illegal activities, such as "lascivious carriage" and "breach of the peace," without showing that such illegal acts actually took place at prior social events of the organization. Although the university may validly exercise a wider degree of regulatory authority with regard to the social functions of purely social organizations, the activities of a cause-oriented group such as the G.S.O. stand on a different footing. Considering the important role that social events can play in an individual's efforts to associate to further their

common beliefs, the prohibition of all social events must be taken to be a substantial abridgment of associational rights guaranteed under the First Amendment.

One last area of concern with regard to student organizations is whether an individual student's membership in a radical or subversive organization can constitute sufficient grounds for non-admission, expulsion, or the denial of financial aid.

Barring extraordinary circumstances, a publicly funded college or university may not predicate "precautionary" or "retaliatory" *measures* upon a student's *mere membership* in a campus or off-campus organization, regardless of the unlawful activities which may have been conducted by *other* persons on behalf of the organization. A student's freedom from disciplinary action in this regard is protected by not only the First Amendment, but also the constitutional prohibition against bills of attainder, and also by the concept of substantive due process.

However, if a student's direct participation in an organizational activity, not otherwise protected under the First Amendment, causes a material and substantial disruption of campus discipline or the normal conduct of a college's academic activities, then a school could be justified in taking "appropriate disciplinary action." Usually this entails suspension or expulsion from school.

Recapitulating, the following determinative factors are to be remembered whenever sanctions are contemplated against students or student organizations for associational activities:

1. Whether the organization or its activities are protected by the U.S. Constitution;
2. If not, whether the individual student was an active, knowing, *participant;*
3. And if so, whether the student's off-campus participation *directly* and *substantially* undermines permissible campus discipline.

Needless to say, satisfying the aforementioned criteria would be at best a matter of speculation with regard to a prospective student who is merely applying for admission. Therefore, weaker grounds exist for the denial of admission than for the suspension or expulsion thereupon.

Schools should also be aware of government regulations which require the termination of federally guaranteed student loans to individual students who participate in violent or disruptive campus demonstrations. In this regard, further consultation with legal counsel may be necessary in order to resolve the interpretative problems which will no doubt arise from the application of this federal law.

BANS ON SPEAKERS

Many state legislators and some college administrators are concerned about the propriety of spending "public funds" (including but not limited to student activity fees) and "state facilities" (college campuses) to finance and promote the advocacy of radical or subversive causes by controversial outside speakers. Essentially, the answer to this question is virtually the

same as the answer to other similar questions arising under the First Amendment freedom of speech. Any blanket prohibitions against the advocacy of constitutionally protected ideas will, of course, be stricken as violative of the First Amendment. However, the school can validly prohibit certain specific speakers where there is a strong showing as to the likelihood of consequent disorder at the school. Here again, if "fear of disorder" is the basis for the specific speaker's ban, it must be predicated upon clear and convincing evidence and not merely speculation based upon the speaker's known radical views. Although a school cannot prevent its students from formally or informally inviting a speaker to appear on campus because he is *too controversial,* at the same time a school need not wait until after a violent disruption has occurred before it can take appropriate action. Schools may validly enact rules and regulations requiring prior approval from college administrators before a presentation may be made on campus by an off-campus speaker. However, when adopting such regulations, the following guidelines should be followed:

1. The regulation should not be overly broad;
2. It must not vest unbridled discretion in the college official responsible for its administration;
3. Prohibitions established under the regulation must not be predicated upon *content* of the intended speech but rather upon the likely *effect* that the speech in question would have upon the normal conduct of campus activities.

If the aforementioned guidelines are followed, reasonable requirements can also be imposed to regulate the time, manner, and place of presentation of the speaker's program, so long as these requirements are not enforced in a manner which discriminates against certain speakers on the basis of their views, and so long as the restrictions imposed are not so burdensome as to make it impossible for the invited speaker to reasonably communicate to the intended audience.

RIGHTS OF "NONSTUDENTS" ON CAMPUS

Do college campuses belong to the people? To what degree can "ordinary" citizens of the state (usually nonstudents who reside in the surrounding community) come on campus property and utilize the school's facilities for the promulgation of cause-oriented activities. Just how "public" *are* publicly supported colleges and universities? To what degree can state supported institutions enact rules and regulations forbidding "unauthorized" persons from entering upon campus premises or remaining in school facilities?

As a result of the widespread proliferation of campus disturbances over the last decade, many of which were believed to have been instigated by "outside agitators," there has been an increasing amount of attention directed toward the constitutionality of anti-trespass regulations, ordinances, and statutes applicable to state and community colleges.

First, it should be remembered that state owned property is not *immune* from cause-oriented protest. On the other hand, there isn't neces-

sarily a constitutional *right* to conduct such activities. The following two factors are generally determinative:

1. Whether a person has a *legitimate right* to normally unhindered access to the public property in question; and
2. Whether the conduct of his intended activities would be otherwise protected by the First Amendment.

In analogous cases involving public high schools, the courts have leaned generally in favor of the anti-trespass regulations as against constitutional attacks predicated upon the First Amendment. Although there is little law with regard to similar regulations involving colleges or universities, the end result will probably be the same. Most urban colleges, especially *community* colleges, encourage community participation in their varied activities. This results in a normal stream of "outsiders" from within the general community coming on the confines of the college itself. So long as these persons therefore have the reasonable right of access, they cannot be excluded for merely participating in peaceful nondisruptive political demonstrations. Not only does this rule apply to *public* colleges and universities, but under the above-mentioned circumstances it would apply equally to *private* schools as well. Although a private school is afforded a great degree of latitude with regard to the conduct of its own affairs, some private schools take on a "quasi-public" demeanor and therefore may not totally suppress First Amendment rights. Neither a private nor a public school must allow persons to come on to their campuses for the purpose of committing acts likely to interfere with the peaceful conduct of the institution. Therefore, reasonable anti-trespass regulations, not specifically enacted or enforced for purposes of suppression of free expression, will likely be upheld. The First Amendment does not protect behavior made unlawful by legitimate regulations or statutory legislation enacted for purposes other than the suppression of constitutionally protected ideas.

LIBEL AND SLANDER

As previously stated within this chapter, the First Amendment freedom of speech does not constitute a "license" to defame. In fact, quite the contrary is true. When a person publicly communicates false statements about another, causing damage to his reputation, the speaker may generally be held liable for the consequences of his act. Nevertheless, the application of First Amendment guarantees does provide *some* limitation with respect to the power of certain "public officials" to either sue or be sued for defamation of character.

As set forth in more detail in the section of this chapter dealing with publishing a libel, some college administrators enjoy a qualified privilege against actions for libel predicated upon defamatory statements inadvertently disseminated during the fulfillment of official job responsibilities. It is believed better in the long run to leave unredressed the harm which may be suffered to the person defamed than to subject all those in official positions who try to do their duty to the constant threat of retaliation. Some courts have therefore held that communications between public officials regarding their duties and conducting public business is necessarily *absolutely* privileged. Therefore, it has been held that a college president

could not be held liable for defamatory remarks about a college librarian when the remarks in question were based upon a directive by the board of regents commanding the president to report any irregularities or misconduct on the part of teachers or other employees at his school. Likewise, public statements concerning a faculty member's alleged religious bias have also been held to be privileged under similar circumstances.

However, only those educators at the very highest echelons of college administration would properly qualify for an *absolute* privilege against liability in an action predicated upon libel or slander. On the other hand, ordinary faculty members are generally considered to hold a *qualified* privilege against the institution of similar suits. This requires that the person communicating information do so for reasons which protect the interests of the public, third parties, or oneself. Therefore, most jurisdictions provide for qualified immunity for faculty members acting within the scope of their employment where misinformation is communicated to others but where the disseminator honestly believed the information to be reliable and correct. Impliedly, no privilege will attach at all to statements which are knowingly false, or which are made in reckless disregard to their truth or falsity. That is the essence of a *qualified* privilege.

Finally, it should also be remembered that the availability of the aforementioned "privileges" can sometimes vary from state to state. As such, administrators (and faculty members as well) would be wise to consult their legal counsel prior to the dissemination of statements likely to incur the wrath of others.

Conversely, college administrators are *themselves* sometimes subject to defamatory statements publicly made by members of their own faculties or by outside persons. Nevertheless, in light of recent Supreme Court decisions, it is apparent that many college administrators, as "public officals," cannot recover damages for the dissemination of derogatory statements regarding so-called "official conduct" unless they are made with "actual malice" or with "recklessness." Although the Supreme Court has never formally delimited how far down the ranks of public employees the "public official" designation would extend, certainly it would at least apply to those among the hierarchy of government employees who have, or who appear to the public to have, substantial responsibility for control over governmental affairs. As such, within the context of higher education the implementation of this constitutionally derived tort suit exemption is primarily directed at *upper echelon administrators* (at publicly funded colleges and universities). However, at the same time the application of this rule is not necessarily limited *solely* to the upper reaches of a college's administration. For example, a state court in Arizona has recently held that a duly elected member of the state university's student senate was a "public official" within the meaning of the rule, and, therefore, in the absence of a showing of actual malice the student senator could not successfully maintain a suit for libel against the student editor and faculty advisor of a university publication.

Furthermore, other persons, including lower echelon administrators, faculty members, and even educators at *private* (as opposed to *public*) institutions, may have involved themselves to such a great degree in matters of public concern as to legally constitute themselves public figures within the meaning of the rule. Therefore, although instructors at public colleges

are generally just public *employees* and not public *officials,* if a professor is deeply involved in controversial causes, and has therefore exposed himself to public criticism, he too will be barred from a recovery for damages to his reputation as a result of any derogatory statements made within this context without showing either malice or recklessness.

Interestingly, there appears to be a double standard with regard to the implementation of the above stated rules within the context of *student disciplinary proceedings.* Although the "actual malice test" has been successfully applied to preclude the across-the-board dismissal of individual faculty members who speak out "on issues of public importance," and who in the process may communicate derogatory statements concerning their administrators, nonetheless, there are also few decisions indicating that the same degree of latitude may not be afforded to *individual students* promulgating the same derogatory remarks. For example, one court upheld a student's expulsion for writing a series of caustic, critical letters to the college president. Another court upheld the expulsion of a student whose chief misconduct was to call the college president "Super-Tom" and other officals "Uncle Toms." In addition, another student was also successfully expelled when he publicly referred to a member of his school's board of trustees as a "honky" during the course of his tirade against the board's administrative policies.

Furthermore, in disciplinary proceedings arising from the above-stated set of circumstances, it is, at this time, even somewhat questionable as to whether a student could avail himself of "truth" as an absolute defense.

CONCLUSION

There are several notable professors of constitutional law who regularly admonish their students not even to read the Constitution. "It will only confuse your minds!"

As a practical matter, this instruction can make a lot of sense. It's not as important to *read* the Constitution as it is to *understand* what it is you read, *especially* with regard to the First Amendment. Reading the Amendment itself gives little clue to the actual application of the constitutional principles embodied therein. Furthermore, the application of the principles in question—freedom of speech, press, and association—is often dependent upon a balancing of extrinsic interests rather than a mere interpretation of the intrinsic document itself.

It is no mere coincidence that constitutional law is constantly in a state of flux. Although the First Amendment has technically been the "law of the land" for approximately 185 years, nevertheless, as exemplified by the cases within this chapter, some of the most dramatic Supreme Court decisions in this area have only been decided within the last 10 to 15 years. Therefore, as an appropriate closing remark, it would be wise to consider one of the major paradoxes of American constitutional law: "About the only thing that is constant is constant continual change." Although it's not at all probable that the First Amendment will be formally amended at any time within the foreseeable future, it is still quite conceivable that the First Amendment of tomorrow will in many respects be dissimilar to the First Amendment of today.

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